No. 17-988	
Title:	Lampe Plus, Inc., et al., Petitioners v. Frank Varela
Docketed:	January 11, 2018
Linked with 17A577	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(16-56085)
Decision Date:	August 3, 2017
Rehearing Denied:	September 11, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Nov 22 2017	Application (17A577) to extend the time to file a petition for a writ of certiorari from December 10, 2017 to January 10, 2018, submitted to Justice Kennedy. Main Document Lower Court Orders/Opinions Proof of Service
Nov 28 2017	Application (17A577) granted by Justice Kennedy extending the time to file until January 10, 2018.
Jan 10 2018	Petition for a writ of certiorari filed. (Response due February 12, 2018) Petition Appendix Certificate of Word Count Proof of Service
Feb 06 2018	Motion to extend the time to file a response from February 12, 2018 to March 14, 2018, submitted to The Clerk. Main Document
Feb 08 2018	Motion to extend the time to file a response is granted and the time is extended to and including March 14, 2018.
Feb 12 2018	Brief amicus curiae of Chamber of Commerce of the United States America filed. Main Document Proof of Service Certificate of Word Count
Mar 14 2018	Brief of respondent Frank Varela in opposition filed. Main Document Certificate of Word Count Proof of Service

Mar 28 2018	DISTRIBUTED for Conference of 4/13/2018.
Mar 28 2018	Reply of petitioners Lamps Plus, Inc., et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 16 2018	DISTRIBUTED for Conference of 4/20/2018.
Apr 23 2018	DISTRIBUTED for Conference of 4/27/2018.
Apr 30 2018	Petition GRANTED.
Jun 04 2018	Motion for an extension of time to file the joint appendix and the opening briefs on the merits filed. **Main Document**
Jun 08 2018	Motion to extend the time to file the joint appendix the opening briefs on the merits granted. The time to file the joint appendix and petitioners' brief on the merits is extended to and including July 9, 2018. The time to file respondent's brief on the merits is extended to and including August 30, 2018.
Jul 09 2018	Brief of petitioners Lamps Plus, Inc., et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 09 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Jul 13 2018	Brief amicus curiae of New England Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 13 2018	Brief amicus curiae of DRI–The Voice of the Defense Bar filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amicus curiae of Center for Workplace Compliance filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amicus curiae of Retail Litigation Center, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amicus curiae of Chamber of Commerce of the United States America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 20 2018	SET FOR ARGUMENT on Monday, October 29 2018

Aug 30 2018	Brief of respondent Frank Varela filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 06 2018	Brief amici curiae of Contract Law Scholars filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 06 2018	Brief amicus curiae of American Association for Justice filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 10 2018	Record requested from the U.S.C.A. 9th Circuit.
Sep 12 2018	CIRCULATED
Oct 01 2018	Reply of petitioners Lamps Plus, Inc., et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 29 2018	Argued. For petitioners: Andrew J. Pincus, Washington, D. C. For respondent: Michele M. Vercoski, Ontario, Cal.

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No.

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stolt-Nielsen, S.A.* v. *AnimalFeeds International Corp.* this Court held that a court could not order arbitration to proceed using class procedures unless there was a "contractual basis" for concluding that the parties have "*agreed to*" class arbitration. 559 U.S. 662, 684 (2010) (emphasis in original). This Court explained that courts may not "presume" such consent from "mere silence on the issue of class arbitration" or "from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687.

The arbitration clause at issue here did not mention class arbitration. A divided Ninth Circuit panel majority (Reinhardt & Wardlaw, JJ.) nonetheless inferred mutual assent to class arbitration from such standard language as the parties' agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings" and a description of the substantive claims subject to arbitration. App., *infra*, 3a-4a.

The question presented is:

Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

RULE 29.6 STATEMENT

Petitioner Lamps Plus Holdings, Inc. is the parent corporation to petitioners Lamps Plus, Inc. and Lamps Plus Centennial, Inc. No publicly held corporation owns a 10% or more ownership interest in Lamps Plus, Inc.; Lamps Centennial, Inc.; or Lamps Plus Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Lamps Plus, Inc., Lamps Plus Centennial, Inc., and Lamps Plus Holdings, Inc. (collectively, Lamps Plus) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 701 F. App'x 670. The order of the court of appeals denying rehearing (App., *infra*, 6a) is unreported. The order of the district court denying in part Lamps Plus's motion to compel individual arbitration and instead compelling arbitration on a class-wide basis (App., *infra*, 7a-23a) is unreported, but is available at 2016 WL 9110161.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2017. App., *infra*, 1a. The court of appeals denied a timely petition for rehearing or rehearing en banc on September 11, 2017. App., *infra*, 6a. On November 28, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including January 10, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the

> Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This Court has repeatedly held that "the differences between bilateral and class-action arbitration are too great" for arbitrators or courts to presume "that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010). Because "class arbitration" is "not arbitration as envisioned by the" Federal Arbitration Act (FAA) and "lacks its benefits," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350-51 (2011), arbitrators or courts may not infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687.

But that is exactly what the panel majority of Judges Reinhardt and Wardlaw did below. By infer-

ring an agreement to class arbitration from standard arbitration-clause provisions, the court below equated the agreement to arbitrate with an agreement to arbitrate on a class basis.

Yet this Court has squarely held that the FAA "requires more" (*Stolt-Nielsen*, 559 U.S. at 687): namely, a "contractual basis for concluding" that the parties have in fact "*agreed* to" class arbitration (*id.* at 686). That result follows naturally from the FAA's "rule[] of fundamental importance" that "arbitration 'is a matter of consent, not coercion.'" *Id.* at 681 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); accord *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 565 (2013) ("Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them.").

As Judge Fernandez succinctly observed in dissent, the decision below is a "palpable evasion of *Stolt-Nielsen*." App., *infra*, 5a. The panel majority simply disregarded numerous terms in the parties' arbitration agreement that plainly contemplate bilateral arbitration, and instead purported to divine contractual consent to class arbitration from language found in virtually any standard arbitration clause.

By providing, for example, that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (App., *infra*, 3a), the contract simply identifies arbitration as the agreed-upon substitute for litigation in court. That and similar contract language does not mean that the arbitration will take place under the same *procedures* available in court, such as the class device. And the majority confused substantive claims and remedies with procedural

rules when it inferred authority for class arbitration from statements that "arbitrable claims are those that 'would have been available to the parties by law'" and that the arbitrator is allowed "to 'award any remedy allowed by applicable law.'" *Id.* at 4a. As the majority itself elsewhere acknowledged, "a class action is a procedural device * * * rather than a separate or distinct claim." *Ibid.* (quotation marks omitted).

Although the panel protested otherwise, its decision involved precisely the type of state-law "interpretive acrobatics" (App., *infra*, 3a) to support its policy preference for class actions that this Court has rejected as incompatible with the FAA, see *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-71 (2015).

By departing from this Court's clear guidance, the panel majority also created a conflict with several other circuits, which have uniformly rejected similar efforts to equate standard arbitration terms with an implicit agreement to class arbitration. Review is thus independently warranted to ensure uniform application of the FAA and underscore that standard language authorizing arbitration of "any and all claims" and waiving the parties' rights to file lawsuits in court does not supply the "contractual basis" needed to "support a finding that the parties agreed to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 687 n.10.

Moreover, the practical consequences of the Ninth Circuit's failure to adhere to this Court's precedents are substantial. If permitted to stand, the decision below will embolden other courts to impose class arbitration on parties that never agreed to it—elevating a policy preference for the class-action de-

vice over the FAA's "basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681 (quotation marks omitted).

This Court's review is therefore essential. And the panel majority's "palpable evasion" of this Court's precedents (App., *infra*, 5a) is so clear as to warrant summary reversal.

A. The Arbitration Agreement Between Lamps Plus And Varela.

Respondent Frank Varela is an employee of Lamps Plus. App., *infra*, 8a. At the beginning of his employment, Varela and a representative of Lamps Plus signed a standalone arbitration agreement (the "Agreement"). *Id.* at 24a-35a.[1]

The Agreement covers "all claims or controversies ('claims'), past, present or future that I may have against the Company or against its offers, directors, employees or agents * * * or that the Company may have against me." App., *infra*, 24a. The Agreement further provides: "Specifically, the Company and *I* mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with *my* employment, or any of the parties' rights and obligations arising under this Agreement." *Id.* at 24a-25a (emphasis added).

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[1] Arbitration is a voluntary term and condition of employment; employees are permitted to opt out of arbitration within 3 days after executing the agreement. App., *infra*, 27a; ER 138. ("ER __" refers to the Excerpts of Record in the court of appeals.) It is undisputed that Varela did not opt out of arbitration. App., *infra*, 10a; ER 138.

The Agreement also informs the employee at the outset that agreeing to arbitration waives his or her right to resolve disputes with Lamps Plus in court:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

App., *infra*, 24a.

The Agreement specifies that the arbitration will be administered by the American Arbitration Association (AAA) or JAMS (App., *infra*, 25a)—two widely-respected arbitration forums.[2] The arbitrator, once appointed, "is authorized to award any remedy allowed by applicable law." *Id.* at 26a.

B. Proceedings Below.

1. In early 2016, Lamps Plus was the victim of a successful "phishing" attack. An unknown third party spoofed the email address of a high-level Lamps Plus employee and sent an email to an actual Lamps Plus employee requesting employees' W-2 tax forms. ER 152. The employee, thinking she was responding

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[2] It is undisputed that Varela's arbitration agreement includes both the document he signed titled "ARBITRATION PROVISION" (App., *infra*, 24a) as well as "ATTACHMENT A," which sets forth in more detail the "LAMPS PLUS EMPLOYMENT ARBITRATION RULES AND PROCEDURES" (*id.* at 29a). See ER 137-138.

to a supervisor's legitimate request, sent copies of current and former employees' 2015 W-2 forms to the third party. App., *infra*, 11a; ER 152.

2. Soon after this attack, respondent Varela filed a putative class action lawsuit in California federal court, asserting statutory and common-law claims related to the data breach. ER 178-202. Lamps Plus moved to "compel arbitration on an individual basis" pursuant to Varela's arbitration agreement. ER 144.

The district court purported to grant the motion, but in fact denied the request for individual arbitration, instead ordering that arbitration take place on a class-wide basis. App., *infra*, 20a-22a. The district court recognized that Varela had entered into a binding arbitration agreement and that his claims in this case fall within the scope of that agreement. *Id.* at 13a-14a. The court further rejected Varela's unconscionability challenges to the enforceability of his agreement. *Id.* at 15a-20a.

On the issue of class arbitration, however, the district court accepted Varela's argument that "the language stating that 'all claims' arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter." App., *infra*, 21a.[3]

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[3] In interpreting the arbitration agreement to authorize class arbitration, the district court also sua sponte questioned whether a waiver of class procedures in arbitration would be enforceable in the employment context. App., *infra*, 22a (citing *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), which was subsequently followed by the Ninth Circuit in *Morris* v.

3. A divided Ninth Circuit panel affirmed the district court's order compelling class rather than individual arbitration. App., *infra*, 1a-5a.

In a per curiam opinion, Judges Reinhardt and Wardlaw discerned "ambiguity" as to whether the parties agreed to class arbitration based on the following language:

- the waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";
- the waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- the agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

App., *infra*, 3a.

Based on this language, the majority maintained that "*the most reasonable*[] interpretation of this expansive language is that it authorizes class arbitration." App., *infra*, 3a. And the majority also relied upon the state-law doctrine that contractual ambiguities should be "construed against the drafter." *Id.* at 3a-4a.

Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016)). (This Court granted review in both cases. 137 S. Ct. 809 (2017).)

The Ninth Circuit, however, affirmed solely on the basis that (in the panel's view) the contract authorized class arbitration. App., *infra*, 1a-5a. Indeed, at oral argument, Judge Reinhardt discouraged Varela from relying on *Morris*, stating that it would be "unwise" to do so in light of this Court's grant of certiorari. See Oral Arg. at 17:10-18:10, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011909.

The majority further inferred "support[]" for its interpretation from (1) the *absence* of any reference to class actions in other parts of the arbitration clause; (2) the arbitration clause's coverage of all "claims or controversies" the parties might have against each other; and (3) the provision in the arbitration clause authorizing the arbitrator to "'award any remedy allowed by applicable law.'" App., *infra*, 3a-4a.

Judge Fernandez dissented. His dissent reads in full:

> I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen* * * *.

App., *infra*, 5a (citation omitted).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's clear holdings that the FAA preempts state law that would compel parties to an arbitration agreement to submit to class arbitration without a contractual basis for concluding that the parties agreed to that procedure. By purporting to find such a basis in standard contract language stating that arbitration substitutes for court proceedings and that the parties agreed to arbitrate "all claims or controversies" between them, the panel majority engaged in a "palpable evasion of *Stolt-Nielsen*." App., *infra*, 5a.

This Court could not have been clearer that, in light of the fundamental differences between class and individual arbitration, the FAA prohibits exactly what the panel below did here: inferring "[a]n implicit agreement to authorize class-action arbitration

* * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685; accord *Oxford Health*, 569 U.S. at 573 (Alito, J., concurring) (quoting same). And the panel's implausible interpretation of the contract in favor of its preference for class procedures is the kind of strained reasoning that this Court recently rejected in *Imburgia*, 136 S. Ct. at 468-71.

Moreover, the Ninth Circuit's "palpable evasion of *Stolt-Nielsen*" created a conflict with an unbroken line of decisions by other circuits. Those courts of appeals have rejected similar efforts to transform standard arbitration terms, such as those relied on by the Ninth Circuit here, into an "implicit" agreement to class arbitration.

This case is an ideal vehicle to address the question presented. It arises out of federal court; the question presented was the sole basis for the decision below; and the parties have not disputed that a court—rather than an arbitrator—should decide whether the arbitration clause permits class procedures. That judicial determination can thus be reviewed de novo, without the constraints imposed by the FAA's limited grounds for review of an arbitrator's decisions. See *Oxford Health*, 569 U.S. at 571-73.

Finally, the decision below represents yet another effort by a court hostile to bilateral arbitration—the type of arbitration "envisioned by the FAA" (*Concepcion*, 563 U.S. at 351)—to circumvent this Court's arbitration precedents. This Court has repeatedly intervened—often summarily—to reject similar evasions. See, *e.g.*, *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421 (2017); *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 568

U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530 (2012) (per curiam).

Here, too, review and reversal of the decision below is warranted to preserve the integrity of this Court's precedents and ensure nationwide uniformity on a question of fundamental importance.

A. The Decision Below Contravenes The FAA And Defies This Court's Precedents.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House*, 534 U.S. 279, 289 (2002) (quotation marks omitted). This Court has thus stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479; see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

An agreement to arbitrate on an individual basis, or "bilateral arbitration," is the form of arbitration "envisioned by the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). As this Court has explained on multiple occasions, in bilateral arbitration the "'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Ibid.* (quoting *Stolt-Nielsen*, 559 U.S. at 685); see also

14 Penn Plaza LLC v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted).

By contrast, "class arbitration" is "*not* arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51 (emphasis added). That is because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. In addition, "class arbitration greatly increases risks to defendants," because "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable" in light of the limited judicial review available. *Id.* at 350.

Because "the relative benefits of class-action arbitration are much less assured," this Court held in *Stolt-Nielsen* that before "a party may * * * be compelled under the FAA to submit to class arbitration," there must be a "contractual basis for concluding" that the parties have "*agreed to*" that procedure. 559 U.S. at 684, 686. This Court further made clear that courts may *not* "presume" such consent from "mere silence on the issue of class-arbitration" or infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687. Instead, as a matter of substantive federal law, "the FAA requires more." *Id.* at 687. In light of the parties' stipulation in that case

"that there was 'no agreement' on the issue of class-action arbitration," however, this Court left open the question of "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 687 n.10.

2. The panel majority's opinion cannot be squared with the settled principles just discussed. The panel purported to recognize these principles. App., *infra*, 2a. But it then proceeded to ignore them by resolving the question left open in *Stolt-Nielsen* in a manner fundamentally incompatible with *Stolt-Nielsen* itself. None of the provisions relied on by the panel majority even remotely supports an inference that the parties "agreed to authorize" class arbitration.

At the outset, the panel relied on the Agreement's statement that the employee's agreement to arbitrate is a "waiver of 'any right I may have to file a lawsuit or other civil action or proceeding relating to *my* employment with the Company'" and of "'any right I may have to resolve employment disputes through trial by judge or jury.'" App., *infra*, 3a (emphasis added). But as this Court recently reiterated, "a waiver of the right to go to court and to receive a jury trial" is "*the primary characteristic* of an arbitration agreement." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427 (emphasis added).

The panel's reasoning thus renders *Stolt-Nielsen* a nullity. If contractual language describing this "primary characteristic" were enough, then *any* arbitration agreement that does not expressly waive class procedures could support an inference that the parties agreed to class arbitration. Yet this Court has clearly held that "the FAA requires more" than "the fact of the parties' agreement to arbitrate" to

support an "implicit agreement to authorize class-action arbitration." 559 U.S. at 685.

Similarly, the passage of the Agreement here stating that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (App., *infra*, 3a) simply means that arbitration replaces litigation in court. It does not mean that the arbitration will duplicate the *procedures* available in court, such as the class device.[4]

Indeed, under the majority's approach, that language would also entitle a party to demand that the arbitration process include other court procedures unless the agreement expressly disclaims them, including "the Federal Rules of Civil Procedure" and "a discovery process rivaling that in litigation." *Concepcion*, 563 U.S. at 351. But those procedures, like the class-action device, also are "not arbitration as envisioned by the FAA" and "lack[] its benefits." *Ibid.* General language stating the obvious proposition that binding arbitration is a substitute for court proceedings cannot support an inference that the parties agreed to jettison the "fundamental attributes of arbitration," including "*streamlined* proceedings." *Id.* at 344 (emphasis added).

The panel majority next brushed aside the multiple portions of the Agreement demonstrating the parties' intent to engage in traditional, bilateral arbitration. For example, the Agreement limits the scope of the claims covered by arbitration to "claims or controversies" that "*I* may have against the Company

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[4] See, *e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "in lieu of" as "[i]nstead of or in place of"); WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY (Deluxe ed. 1996) (similarly defining "in lieu of" as "instead of" or "in place of").

* * * or that the Company * * * may have against *me*" "aris[ing] in connection with *my* employment, or any of the parties' rights and obligations arising under *this Agreement*." App., *infra*, 24a-25a (emphasis added).

Yet the majority concluded that this language was irrelevant because "Varela's claims against the company include those that could be brought as part of a class." *Id.* at 4a. And it further reasoned that the Agreement's authorization of arbitration for claims that "'would have been available to the parties by law'" "obviously include[s] claims as part of a class proceeding." *Ibid.*[5]

That interpretation makes no sense. Because a class action is nothing more than the sum of each class member's individual claims, Rule 23 cannot transform the claims of *other* employees into *Varela*'s claims, and those other individuals' claims plainly do not relate to *Varela*'s employment with Lamps Plus.

That basic principle has long been established. Nearly four decades ago, this Court recognized that the class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged"). The panel majority itself recognized this

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[5] The Agreement also limited the parties to one deposition per side (subject to the arbitrator's discretion to allow additional depositions). App., *infra*, 32a. That presumptive limit on discovery is impossible to square with the panel majority's conclusion that the parties agreed to authorize class arbitration.

rule in the very next paragraph, acknowledging that "a class action is a procedural device * * * rather than a separate or distinct claim." App., *infra*, 4a (quotation marks omitted).

Moreover, the broad range of substantive disputes subject to arbitration (App., *infra*, 4a) says nothing about the procedures under which the arbitration will be conducted; in particular, it does not address whether class procedures are available for the resolution of any dispute. In other words, this passage of the Agreement simply demonstrates that Varela and Lamps Plus agreed "to submit their disputes to an arbitrator"—nothing more. That agreement is precisely what this Court held *cannot* supply the basis for "[a]n implicit agreement to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 685.[6]

For similar reasons, the Agreement's provision authorizing the arbitrator to "'award any remedy allowed by applicable law'" cannot support the panel majority's interpretation. App., *infra*, 4a. A class action is not itself a remedy, but rather, again, simply a procedural device for aggregating multiple requests for underlying substantive relief.

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[6] Notably, the Agreement says only that the AAA or JAMS employment arbitration rules shall apply (App., *infra*, 25a-26a, 29a), with no reference to the AAA Supplementary Rules for Class Arbitrations (see https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf) or the JAMS Class Action Procedures (see https://www.jamsadr.com/rules-class-action-procedures/). And the procedures addressed in the Agreement repeatedly refer to "*either* party," further reinforcing the Agreement's bilateral nature. App., *infra*, 29a-31a (emphasis added).

In contrast with Judges Reinhardt and Wardlaw's purported application of California law, multiple California state courts have rejected arguments that similarly worded arbitration provisions in the employment context can support an implicit agreement to class arbitration. See *Nelsen* v. *Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115 (2012); *Kinecta Alternative Fin. Solutions, Inc.* v. *Super. Ct.*, 205 Cal.App.4th 506 (2012), disapproved of on other grounds by *Sandquist* v. *Lebo Auto., Inc.*, 1 Cal. 5th 233 (2016). In *Kinecta*, the Court of Appeal applied *Stolt-Nielsen* to "conclude that the parties did not agree to authorize class arbitration in their arbitration agreement" through language authorizing arbitration of "'any claim, dispute, and/or controversy that either *I* may have against the Credit Union * * * or the Credit Union may have against *me*, arising from, related to, or having any relationship or connection whatsoever with *my* seeking employment with, employment by, or other association with the Credit Union.'" 205 Cal.App.4th at 519.

Like the arbitration provision here (App., *infra*, 25a), the arbitration agreement in *Kinecta* covered employment disputes under a variety of enumerated state and federal statutes. *Id.* at 511 n.1. And also like the arbitration provision here (App., *infra*, 24a-25a), the arbitration agreement "ma[de] no reference to employee groups or to other employees," instead "refer[ring] exclusively to 'I,' 'me,' and 'my' (designating [the employee])." 205 Cal.App.4th at 517; see also *Nelsen*, 207 Cal.App.4th at 1130 (following *Kinecta* in a "nearly identical" case).

This directly contrary "California case law" further reveals that the panel majority's opinion is far from a neutral application of ordinary state-law con-

tract principles. *Imburgia*, 136 S. Ct. at 469. Rather, it is a "unique," result-oriented interpretation (*ibid.*), transparently motivated by the panel majority's preference for the class device and desire to "eva[de]" this Court's decisions in *Stolt-Nielsen* and *Concepcion*. App., *infra*, 5a.

3. Finally, the panel majority "cannot salvage its decision" (*Kindred Nursing Ctrs.*, 137 S. Ct. at 1427) by reliance on the state-law canon of contractual interpretation providing that ambiguous terms are construed against the drafter. App., *infra*, 3a-4a. That doctrine cannot be relied on to manufacture consent to class arbitration when, as here, the arbitration clause itself lacks any indication of an agreement to use class procedures.

To begin with, the canon is inapposite because there are no ambiguous terms to interpret for all of the reasons discussed above. As the dissent put it, "the Agreement was not ambiguous." App., *infra*, 5a.

In any event, the FAA forecloses the panel majority's reliance on a state-law canon to manufacture the consent to class arbitration that the "*FAA* requires" as a matter of federal law. *Stolt-Nielsen*, 559 U.S. at 687 (emphasis added). As this Court explained in *Stolt-Nielsen*, "[w]hile the interpretation of an arbitration agreement is *generally* a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." *Id.* at 681 (emphasis added; quotation marks omitted). And in *Concepcion*, the Court held that "class arbitration, to the extent it is manufactured by [application of a state law doctrine] rather than consensual, is inconsistent with the FAA." 563 U.S. at 348.

Thus, the majority's invocation of this state-law canon cannot save its patently erroneous interpretation of the parties' arbitration agreement. As this Court pointed out in *Imburgia*, "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." 136 S. Ct. at 470.

B. The Decision Below Conflicts With The Decisions Of Several Other Circuits.

By departing from this Court's clear guidance, Judges Reinhardt and Wardlaw created a conflict among the courts of appeals that independently warrants this Court's review. Other circuits applying *Stolt-Nielsen* have consistently rejected similar efforts to transform standard arbitration terms into an "implicit" agreement to class arbitration.

The Sixth Circuit has *three* times rejected arguments indistinguishable from those relied on below. First, in *Reed Elsevier, Inc. ex rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, (6th Cir. 2013), the court declined to infer an agreement to class arbitration from language providing for arbitration of "any controversy, claim, or counterclaim * * * arising out of or in connection with this Order." *Id.* at 599. "The principal reason to conclude that this arbitration clause does not authorize classwide arbitration," the court began, "is that the clause nowhere mentions it." *Ibid.* And a "second reason," the court continued, "is that the clause limits its scope to claims 'arising from or in connection with *this Order*,' as opposed to other customers' orders." *Ibid.* The court further rejected as irrelevant the plaintiff's argument "that the agreement does not expressly exclude the possibility of classwide arbitration," explaining that "the agreement does not include it either"— explicitly or

implicitly—"which is what the agreement needs to do in order for us to force that momentous consequence upon the parties here." *Id.* at 600.

A year later, the Sixth Circuit reached the same conclusion in construing an employment agreement that called for arbitration of "[a]ny Claim arising out of or relating to this Agreement." *Huffman* v. *Hilltop Cos., LLC*, 747 F.3d 391, 393 (6th Cir. 2014). The Court explained: "As was * * * the case in *Reed Elsevier*, here the parties' arbitration clause nowhere mentions classwide arbitration. We therefore conclude that the arbitration clause does not authorize classwide arbitration, and hold that the plaintiffs must proceed individually." *Id.* at 398-99 (citation omitted).

Most recently, in *AlixPartners, LLP* v. *Brewington*, another employment arbitration case, the court discerned no agreement to class arbitration in language providing for the arbitration of "any dispute arising out of or in connection with any aspect of this Agreement" and providing that "all substantive rights and remedies" shall be available in arbitration. 836 F.3d 543, 547 (6th Cir. 2016). The court explained that this language constituted merely "silen[ce] on the availability of classwide arbitration, and we may not presume from 'mere silence' that the parties consented to it." *Id.* at 553 (quoting *Stolt-Nielsen*, 559 U.S. at 687). The court further reasoned that class arbitration could not be inferred because "the clause limits its scope to claims 'arising out of or in connection with any aspect of *this Agreement*,' as opposed to other employees' and/or potential employees' agreements." *Ibid.*

The Third Circuit has also refused to infer consent to class arbitration from the parties' broad

agreement to arbitrate "[a]ny dispute or claim arising out of or relating to Employee's employment * * * or any provision of this Agreement," *Opalinski* v. *Robert Half Int'l Inc.*, 677 F. App'x 738, 742 (3d Cir. 2017) (quotation marks omitted)—language materially identical to that from which the Ninth Circuit inferred a contractual basis for class arbitration here. The arbitration agreement likewise contained similar language requiring arbitration "to the fullest extent permitted by law." *Opalinski* v. *Robert Half Int'l, Inc.*, 2015 WL 7306420, at *1 (D.N.J. Nov. 18, 2015), *aff'd* 677 F. App'x 738.

The Third Circuit rejected the precise approach that the decision below adopted, holding it fundamentally incompatible with *Stolt-Nielsen*: "the Supreme Court was clear * * * that '[a]n implicit agreement to authorize class-action arbitration' cannot be inferred 'solely from the fact of the parties' agreement to arbitrate.'" 677 F. App'x at 742 (quoting *Stolt-Nielsen*, 559 U.S. at 685). The court explained that the "problem" with the plaintiffs' reliance on broad "any dispute or claim" language is twofold: (1) it "misses the critical point" that the agreement refers to claims that "relate to the *particular* employee's employment, not *any* employee's employment"; and (2) it "shows only the parties' general intent to arbitrate their disputes," which cannot support an inference of "an intent to arbitrate class claims." *Ibid.*

The decision below is also irreconcilable with the Fifth Circuit's application of *Stolt-Nielsen*. See *Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643-44 (5th Cir. 2012), abrogated on other grounds by *Oxford*

Health, 569 U.S. 564.[7] In *Reed*, the plaintiff agreed to arbitrate "any dispute arising from my enrollment" and the agreement provided that "[a]ny remedy available from a court under the law shall be available in the arbitration." 681 F.3d at 641. The Fifth Circuit explained that neither of these provisions "even remotely relates to or authorizes class arbitration." *Id.* at 642. Specifically, the "'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements." *Ibid.* And the "remedy" provision says nothing about the availability of a class action, which is a "procedural device": "while a class action may lead to certain types of remedies or relief, a class action is not *itself* a remedy." *Id.* at 643.

Two other circuits had refused even before *Stolt-Nielsen* to order class arbitration when the arbitration clause made "no provision for arbitration as a class." *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); see also *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995). *Stolt-Nielsen* confirmed that these circuits' approach was correct.

C. The Decision Below Is Exceptionally Important.

The decision below warrants this Court's review for several reasons.

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[7] In *Reed*, the Fifth Circuit reviewed an arbitrator's contract interpretation. 681 F.3d at 646. This Court's decision in *Oxford Health* makes clear that the Fifth Circuit was not permitted to override the arbitrator's determination in light of the limited judicial review under Section 10 of the FAA. But *Reed's* analysis would apply fully to the *de novo* review of a district court's contract interpretation.

1. Consistency in the lower courts on the application of the FAA is a matter of considerable practical significance. This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority" (*Allied-Bruce Terminix Cos.*, 513 U.S. at 272), which means that departure from the FAA's principles will create confusion about the application of arbitration agreements and lead to the defeat of the contracting parties' expectations.

As demonstrated by the numerous cases cited above (at 19-22), the issue presented arises with considerable frequency. The frequency of the issue presented—and the outlier status of the decision below—are further reinforced by district court decisions from across the country, which have followed this Court's guidance in *Stolt-Nielsen* and refused to infer an agreement to class arbitration from standard arbitration terms.[8]

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[8] See, *e.g.*, *JPay, Inc.* v. *Kobel*, 2017 WL 3218218, at *4-5 (S.D. Fla. July 28, 2017) (broad agreement to arbitrate "Any [] dispute, claim, or controversy among the Parties" does not suffice; holding that "concerns" about small value of individual claims "are not a basis for adding a term to an arbitration agreement on which the parties did not clearly agree") (alteration in original); *Del Webb Communities, Inc.* v. *Carlson*, 2017 WL 1050139, at *2 (D.S.C. Feb. 1, 2017) (following Sixth Circuit's decision in *Reed Elsevier* in construing sales agreement with similar language); *Henderson* v. *U.S. Patent Comm'n, Ltd.*, 188 F. Supp. 3d 798, 809-10 (N.D. Ill. 2016) ("(1) bilateral arbitration language such as that in the [agreements at issue] is silent as to the issue of class arbitration; and (2) silence is not sufficient to permit class arbitration."); *NCR Corp.* v. *Jones*, 157 F. Supp. 3d 460, 467-71 (W.D.N.C. 2016) (agreement to arbitrate "every possible claim * * * arising out of or relating in any way to my employment" and language that parties "intend for this Agreement to

This conflict yields the untenable result that a party within the Ninth Circuit can be subjected to class arbitration while similarly-situated parties elsewhere will not. And if permitted to stand, the decision below could embolden other courts to elevate their preferences for class procedures over the FAA's primary purpose of enforcing arbitration agreements according to their terms. This Court's intervention is needed to ensure that parties' rights under the FAA do not depend on the forum in which they seek to enforce an arbitration agreement.

2. The practical consequences are especially acute when class-action procedures are superimposed upon arbitration absent clear agreement by the parties.

Ensuring robust consent to class arbitration is critical because "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *Concepcion*, 563 U.S. at

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be interpreted broadly to allow arbitration of as many disputes as possible" does not suffice; plaintiff's request to read that language to permit class arbitration "flies in the face of binding precedent requiring the court to do exactly the opposite"); *Bird* v. *Turner*, 2015 WL 5168575, at *9 (N.D. W. Va. Sept. 1, 2015) ("[T]he arbitration agreement does not indicate that the parties consented to class arbitration" when the agreement "does not mention class arbitration" and "is put in terms of bilateral disputes"); *Hickey* v. *Brinker Int'l Payroll Co.*, 2014 WL 622883, at *4 (D. Colo. Feb. 18, 2014) (agreement to arbitrate "any legal or equitable claims or disputes arising out of or in connection with employment" amounts to "mere silence" on the issue of class or collective arbitration); *Smith* v. *BT Conferencing, Inc.*, 2013 WL 5937313, at *9 (S.D. Ohio Nov. 5, 2013) (agreement to arbitrate "any dispute * * * arising out of or relating to my employment" is "silent regarding class arbitration" and "plain language" covers only employee's disputes, not "disputes arising out of the employment of others").

347 (quoting *Stolt-Nielsen*, 559 U.S. at 686); see also pages 11-13, *supra*. Indeed, class arbitration is a worst-of-both worlds hybrid of arbitration and litigation.

On the one hand, the expedition, informality, and cost-savings of traditional bilateral arbitration are lost. Class arbitration "*requires* procedural formality" and "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 349-50; see also *Stolt-Nielsen*, 559 U.S. at 686. And it raises the "commercial stakes" to defendants to a "comparable" level "to those of class-action litigation." *Stolt-Nielsen*, 559 U.S. at 686.

On the other hand, the extremely limited judicial review of the arbitrator's decisions remains intact. This combination of enormous stakes and minimal review "greatly increases risks to defendants." *Concepcion*, 563 U.S. at 350. Many defendants are willing to forego meaningful judicial review in an individual arbitration because of their desire for a less costly and less adversarial method of resolving disputes. See *Concepcion*, 563 U.S. at 350; *Stolt-Nielsen*, 559 U.S. at 685. But the calculus changes "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once," creating an "unacceptable" risk of error and subjecting defendants to the hydraulic pressure of "settling questionable claims." *Concepcion*, 563 U.S. at 350.

Beyond the lack of effective judicial review, the *res judicata* effect of a class arbitration is unsettled at best. Because arbitration "is a matter of consent, not coercion" (*Volt*, 489 U.S. at 479), when an arbi-

tration agreement does not clearly authorize class arbitration, absent class members would have a powerful due process argument that they did not agree to be bound by an award resulting from an arbitration proceeding in which they did not participate. As Justice Alito put it in his *Oxford Health* concurrence (joined by Justice Thomas), "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute." 569 U.S. at 574 (Alito, J., concurring).

At a minimum, these due process concerns increase the procedural complexity required. See *Concepcion*, 563 U.S. at 333 ("If procedures are too informal, absent class members would not be bound by the arbitration."). And even the notice and opt-out procedures employed in class-action litigation in court may not suffice: "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members" who "have not submitted themselves to th[e] arbitrator's authority in any way." *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring). The upshot of a class arbitration's vulnerability to collateral attack is that "absent class members [can] unfairly 'claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Id.* at 575 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 546-47 (1974)). That result is palpably unfair.

For all of these reasons, "[a]rbitration is poorly suited to the higher stakes of class litigation." *Concepcion*, 563 U.S. at 350. And if garden-variety arbi-

tration agreements like the one in this case can be interpreted to permit class arbitration, defendants who have entered into such agreements will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment. It is hard to imagine a result more inimical to the strong federal policy favoring arbitration embodied by the FAA.

3. The approach taken by the court below is especially questionable for the reasons discussed above. In fact, given the "obvious" nature of the error below (*Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006)), the Court might wish to consider summary reversal. The Court has taken that step several times in recent years to set aside manifest failures by lower courts to adhere to this Court's arbitration rulings. See *Nitro-Lift Techs.*, 568 U.S. at 20 (lower court "disregard[ed] this Court's precedents on the FAA"); *Marmet*, 565 U.S. at 531 (lower court erred "by misreading and disregarding the precedents of this Court interpreting the FAA"); *KPMG LLP* v. *Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (lower court "fail[ed] to give effect to the plain meaning of the [FAA]"); see also *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2002) (per curiam) (lower court refused to apply the FAA by taking an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's holdings). And this Court also, of course, has recently overturned other flawed arbitration rulings after plenary review. See *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427-28; *Imburgia*, 136 S. Ct. at 468-71.

4. Finally, this case is an ideal vehicle. It arises out of federal court, so it does not implicate the views expressed by one member of this Court that the FAA

does not apply in state court proceedings. The case also cleanly presents a *judicial* construction of the parties' arbitration agreement rather than an arbitral one—the latter of which is reviewed only under the limited grounds for review of arbitral awards.

In *Oxford Health*, for example, this Court refused to overturn an *arbitrator*'s determination that a similarly "garden-variety arbitration clause" that "lack[ed] any of the terms or features that would indicate an agreement to use class procedures" supported class arbitration "because, *and only because*, it is not properly addressed to a court" given the forgiving standard of review for an arbitrator's decision. 569 U.S. at 572 (emphasis added). As the concurring Justices put it, "[i]f we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate.'" *Id.* at 574 (Alito, J.) (quoting *Stolt-Nielsen*, 559 U.S. at 685). Here, review is indeed "*de novo*," and under that standard, the decision below cries out for reversal.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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APPENDICES

APPENDIX A

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK VARELA, on behalf of himself and all other similarly situated,
Plaintiff-Appellee,
v.
LAMPS PLUS, INC.; et al.,
Defendants-Appellants.

No. 16-56085

D.C. No. 5:16-cv-00577-DMG-KS

MEMORANDUM[1]

Appeal from the United States District Court for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted July 12, 2017
Pasadena, California

Before: REINHARDT, FERNANDEZ, and WARDLAW, Circuit Judges.

Lamps Plus appeals an order permitting class arbitration of claims related to a data breach of personal identifying information of its employees. After Lamps Plus released his personal information in response to a phishing scam, Frank Varela filed a class action complaint alleging negligence, breach of contract, invasion of privacy, and other claims. Lamps

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[1] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plus moved to compel bilateral arbitration pursuant to an arbitration agreement ("the Agreement") it drafted and required Varela to sign as a condition of his employment. The district court found that the Agreement is a contract of adhesion and ambiguous as to class arbitration. It construed the ambiguity against the drafter, Lamps Plus, and compelled arbitration of all claims, allowing class-wide arbitration to proceed.

On appeal, Lamps Plus argues that the parties did not agree to class arbitration. We disagree, and affirm the district court.

"[A] party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). The parties agree that the Agreement includes no express mention of class proceedings. However, as the Supreme Court stated, "silence" in its *Stolt-Nielsen* analysis constituted more than the mere absence of language explicitly referring to class arbitration; instead, it meant the absence of *agreement*. 559 U.S. at 687 ("[W]e see the question as being whether the parties *agreed to authorize* class arbitration."); *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069-70 (2013). There, the Supreme Court accepted the parties' stipulation that silence meant "there's been no agreement that has been reached ...." 559 U.S. at 668-69. That the Agreement does not expressly refer to class arbitration is not the "silence" contemplated in *Stolt-Nielsen*.

We apply state law contract principles in order to interpret the Agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In Califor-

nia, a contract is ambiguous "when it is capable of two or more constructions, both of which are reasonable." *Powerine Oil Co. v. Super. Ct.*, 118 P.3d 589, 571 (Cal. 2005). Contracts may be ambiguous as a whole despite terms and phrases that are not themselves inherently ambiguous. *See Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 60 (Cal. 2006). Ambiguity is construed against the drafter, a rule that "applies with peculiar force in the case of a contract of adhesion." *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016).

At its outset, the Agreement contains a paragraph outlining Varela's understanding of the terms in three sweeping phrases. First, it states Varela's assent to waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company." Second, it includes an additional waiver by Varela of "any right I may have to resolve employment disputes through trial by judge or jury." Third, "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." A reasonable – and perhaps *the most reasonable* – interpretation of this expansive language is that it authorizes class arbitration. It requires no act of interpretive acrobatics to include class proceedings as part of a "lawsuit or other civil legal proceeding[]." Class actions are certainly one of the means to resolve employment disputes in court. That arbitration will be "in lieu of" a set of actions that includes class actions can be reasonably read to allow for class arbitration.

This construction is supported by the paragraph below these broad statements, captioned "Claims Covered by the Arbitration Provision." The first sentence contemplates "claims or controversies" the par-

ties may have *against* each other, which Lamps Plus argues supports purely binary claims. Yet Varela's claims against the company include those that could be brought as part of a class. The Agreement then specifies that arbitrable claims are those that "would have been available to the parties by law," which obviously include claims as part of a class proceeding. The paragraph lists a non-limiting, vast array of claims covered by the arbitration provisions, including many types of claims for discrimination or harassment ("race, sex, sexual orientation . . .") that are frequently resolved through class proceedings. *See, e.g., E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) ("[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The paragraph concludes by excluding from the Agreement two types of claims, but not any class or collective proceedings.

Moreover, a class action is "a procedural device for resolving the claims of absent parties on a representative basis" rather than a separate or distinct "claim." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435 (9th Cir. 2015). The broad language of the Agreement is not limited to claims. Varela surrendered his right to bring all "lawsuit[s] or other civil action[s] or *proceeding*[*s*]." (emphasis added). Additionally, the Agreement authorizes the Arbitrator to "award any remedy allowed by applicable law." Those remedies include class-wide relief.

Because the Agreement is capable of two reasonable constructions, the district court correctly found ambiguity. State contract principles require construction against Lamps Plus, the drafter of the adhesive Agreement. By accepting the construction pos-

ited by Varela – that the ambiguous Agreement permits class arbitration – the district court properly found the necessary "contractual basis" for agreement to class arbitration. *Stolt-Nielsen*, 559 U.S. at 684.

We **AFFIRM** and **VACATE** the stay of arbitration.

Varela v. Lamps Plus, Inc., No. 16-56085

FERNANDEZ, Circuit Judge, dissenting:

I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684–85, 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010).

APPENDIX B

FILED SEP 11 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK VARELA, on behalf of himself
and all other similarly situated,
Plaintiff-Appellee,

v.

LAMPS PLUS, INC.; et al.,
Defendants-Appellants.

No. 16-56085

D.C. No. 5:16-cv-00577-DMG-KS
Central District of California, Riverside

ORDER

Before: REINHARDT, FERNANDEZ, and WARDLAW, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Reinhardt and Judge Wardlaw voted to deny the petition for rehearing en banc, and Judge Fernandez so recommended.

The full court was advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are **DENIED**. No further petitions for panel or en banc rehearing will be entertained.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 16-577-DMG (KSx) Date July 7, 2016

Title ***Frank Varela v. Lamps Plus, Inc., et al.***

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANT'S MOTION TO COMPEL ARBITRATION OR, ALTERNATIVELY, MOTION TO DISMISS [34]

I.
PROCEDURAL BACKGROUND

On March 29, 2016, Plaintiff Frank Varela filed a class action complaint ("Compl.") against Lamps Plus, Inc., Lamps Plus Centennial, Inc., and Lamps Plus Holdings, Inc. (collectively "Lamps Plus") for (1) negligence, (2) breach of implied contract, (3) violation of the California Consumer Records Act (Cal. Civ. Code §§ 1798.81.5, 1798.82), (4) violation of the California Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code § 17200 *et seq.*), (5) invasion of privacy, and (6) negligent violation of the Credit Reporting Act. [Doc. # 1.]

On May 31, 2016, Lamps Plus filed a Motion to Compel Arbitration on an individual basis ("MTC") or, alternatively, a Motion to Dismiss ("MTD"). [Doc. #34.] On June 10, 2016, Varela filed an Opposition ("Opp.") to Lamps Plus's motions. [Doc. #37.] On June 17, 2016, Lamps Plus filed a Reply. [Doc. #38.]

II.
FACTUAL BACKGROUND

Varela has been an employee of Lamps Plus for approximately nine years and is currently employed there as a Warehouseman at the Lamps Plus warehouse located in Redlands, California. (Compl. ¶ 7). As a condition of employment, Lamps Plus required Varela to provide it with his personal information. (*Id.* ¶ 11.) On Varela's first day of work, he signed multiple documents, including an arbitration agreement, as a condition of his employment with Lamps Plus. (Declaration of Frank Varela in Support of Plaintiff's Opposition to Motion to Compel Arbitration/Motion to Dismiss ("Varela Decl.") ¶ 6 [Doc. # 37-2]; Declaration of Lucenda Jo Beeson in Support of Defendant Lamps Plus, Inc.'s Motion to Compel Arbitration on an Individual Basis ("Beeson Decl.") ¶¶ 4, 7, Ex. 1 (Arb. Agreement) [Doc. # 34-2]). Varela contends that he does not remember signing this document or having its contents explained to him, but does not contest the fact that he signed it. (Varela ¶¶ 6-10.) Varela states that he does not remember being advised by anyone from Lamps Plus to consult an attorney prior to signing the arbitration provision and, even if he had been so advised, he could not have afforded to retain an attorney to review the arbitration provision. (*Id.* ¶ 8.) Lamps Plus Human Resources Director Lucenda Jo Beeson confirms that Lamps Plus employees generally must

sign an Arbitration Agreement as a condition of employment with Lamps Plus. (Beeson Decl. ¶ 3.) The Arbitration Agreement states that part of its "employment practice is agreeing to abide by the terms in the Arbitration Agreement" and an employee should therefore "read this agreement and be willing to sign it if an employment offer is made." (Arb. Agreement at 1.)

> The Arbitration Agreement provides in pertinent part:
>
> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement.

(*Id.* at 1.) The Agreement states that "any and all disputes, claims, or controversies arising out of or relating to this Agreement ... shall be resolved by final and binding arbitration as the exclusive remedy." (*Id.*) The then-current American Arbitration Association ("AAA") National Rules for the Resolution of Employment Disputes or the then-current J.A.M.S Arbitration Rules and Procedures for Employment Disputes apply to the arbitration. (*Id.*)

The Agreement further states, in all-capital letters: "I UNDERSTAND THAT I HAVE THREE (3)

DAYS FOLLOWING THE SIGNING OF THIS AGREEMENT TO REVOKE THIS AGREEMENT AND THAT THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED." (*Id.* at 2.) Beeson confirms that a Lamps Plus employee may revoke the Arbitration Agreement up to three days after signing it. (Beeson Decl. ¶ 9.) Varela did not revoke the Agreement during the three-day window. (*Id.*)

The Agreement also states that "[t]he Arbitrator is authorized to award any remedy allowed by applicable law" and the Agreement does not "prohibit or limit the parties from seeking injunctive relief in lieu of or in addition to arbitration at any time directly from a Court of competent jurisdiction." (Arb. Agreement at 1-2.) The Agreement further states that:

> The Company agrees to pay all fees associated with the arbitration that are unique to arbitration including the cost of the arbitrator. These costs do not include the initial filing fee if I initiate the arbitration costs or the costs of discovery, expert witnesses, or other costs which I would have been required to bear had the matter been filed in a court. The costs of arbitration are borne by the Company. The parties will be responsible for paying their own attorneys' fees, except as otherwise required by law and determined by the arbitrator in accord with applicable law.

(*Id.* at 2.) The Lamps Plus Employment Arbitration Rules and Procedures reiterate that the "fees, costs and expenses of ... the arbitrator shall be allocated between the parties as provided in ... the Mutual

Agreement to Arbitrate Claims[.]" (Arb. Agreement, Ex. A ("Lamp Plus Rules") ¶ 5H [Doc. # 37-1].)

The final paragraph of the agreement provides, in all-capital letters: "I ACKNOWLEDGE THAT I HAVE BEEN ADVISED TO CONSULT WITH LEGAL COUNSEL BEFORE SIGNING THIS AGREEMENT. I UNDERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO FILE A LAWSUIT IN A COURT OF LAW AND TO HAVE MY CASE HEARD BY A JUDGE AND/OR JURY." (*Id.* at 2.)

The Lamps Plus Employment Arbitration Rules and Procedures provide that "[e]ach party has the right to take the deposition of one individual as well as any expert designated by either party." (Lamps Plus Rules ¶ 5B) The Lamps Plus Rules state that "[n]o other discovery shall be had, except upon order of the arbitrator and upon a showing of substantial need." (*Id.* ¶ 5D.)

On or around March 3, 2016, "a criminal" obtained unauthorized access to copies of current and former employees' W-2 income and tax withholding statements, compromising the security of sensitive personal information of approximately 1,300 employees. (Compl. ¶¶ 1,4.) Varela's information was stolen as a result of the Data Breach. (*Id.* ¶ 7.) As a result of the data breach, Varela's 2015 income taxes were fraudulently filed with the information that was stolen. (*Id.* ¶ 8.) The proposed class includes current and former employees of Lamps Plus, as well as family members and close friends who were affected by the information breach. (*Id.* ¶ 1.)

III.
LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011). "The basic role for courts under the FAA is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (internal citation and quotation marks omitted).

Federal substantive law governs questions concerning the interpretation and enforceability of arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). Courts apply ordinary state law contract principles, however, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability)[.]" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995). "[C]lear and unmistakable evidence" is required for courts to conclude that the parties have agreed to arbitrate arbitrability. *Id.* (internal citations and quotations omitted). As long as an arbitration clause is not itself invalid under "generally applicable contract defenses, such as fraud, duress, or unconscionability," it must be enforced according to its terms. *Concepcion*, 563 U.S. at 343.

Under California law, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while

a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836, 842, 181 Cal. Rptr. 3d 781, 786 (2014) (internal citation omitted). "The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence[.]" *Id.* (internal citation omitted).

IV.
DISCUSSION

A. Scope of Arbitration Agreement

When there is a dispute regarding arbitrability, "[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate[.]" *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651, 106 S. Ct. 1415, 1420, 89 L. Ed. 2d 648 (1986). Ambiguities in arbitration agreements are "to be resolved in favor of arbitrability[.]" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 288, 130 S. Ct. 2847, 2850, 177 L. Ed. 2d 567 (2010); *see also Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996) ("We interpret the contract by applying general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration.").

Varela contends that the motion to compel arbitration should be denied because the complaint is outside of the scope of his arbitration agreement with Lamps Plus. Varela asserts that the data breach is "an administrative task ancillary to the employment relationship" that falls outside of the scope of an employment claim.

When the scope of the arbitration agreement is broad, the matter should be submitted to arbitration. *See Bhd. of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 511-12 (9th Cir. 1987); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("factual allegations need only "touch matters" covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability."); *Bui v. Northrop Grumman Sys. Corp.*, Case No. 15-CV-1397-WQH-WVG, 2015 WL 8492502, at *7 (S.D. Cal. Dec. 10, 2015) ("based on the broad language of the Agreement, the court concludes that Plaintiff's...claim falls within the scope of the Arbitration Agreement.").

The Arbitration Agreement states that the parties agree to arbitrate "all claims or controversies" Varela may have against the Company or against its officers, directors, employees or agents. The Agreement goes on to specify that it applies to all claims that arise "in connection with [Varela's] employment." The language of the Arbitration Agreement is broad, encompassing *all* claims Varela may have against Lamps Plus or its officers. The claim at issue here also arises "in connection" with Varela's employment, in that Lamps Plus collected and stored his personal information in connection with his employment there. Based on the plain language of the Arbitration Agreement, the Court concludes that Varela's claims fall within the broad scope of the arbitration clause.

B. Unconscionability

Varela asserts that the Arbitration Agreement is invalid because it is unconscionable. Under California law, "the doctrine of unconscionability has both a

procedural and substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133, 163 Cal. Rptr. 3d 269 (2013). Both procedural and substantive unconscionability are required to render a contract unenforceable, but they need not be present in the same degree. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745 (2000). "California law utilizes a sliding scale to determine unconscionability—greater substantive unconscionability may compensate for lesser procedural unconscionability." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) (internal citation omitted). Whether a contract or provision is unconscionable is a question of law. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 851, 113 Cal. Rptr. 2d 376 (2001). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n*, 55 Cal. 4th 223, 247, 145 Cal. Rptr. 3d 514 (2012).

1. Procedural Unconscionability

Varela contends that, because the contract that was drafted solely by Lamps Plus on a "take-it-or-leave-it" basis and he was never granted the opportunity to negotiate the terms, the agreement is procedurally unconscionable.

"[T]he critical factor in procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated[.]" *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1282 (9th Cir. 2006). In assessing procedural unconscionability, courts have considered whether a contract is one of adhesion, "i.e., a standardized con-

tract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). A court assessing procedural unconscionability also considers the factors of oppression and surprise due to unequal bargaining power. *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 783 (9th Cir. 2002). "Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in 'no real negotiation.'" *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013). "Surprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectations of the weaker party." *Id.*

In this case, while signing the Agreement did appear to be a type of "take-it-or-leave-it" condition of employment, there was minimal oppression or surprise. The Agreement's terms were clearly disclosed, and it was a stand-alone Agreement, labeled as such, rather than being folded into a general employment contract in which its terms were more likely to be overlooked. *See Fouts v. Milgard Mfg., Inc.*, Case No. C11-06269 HRL, 2012 WL 1438817, at *6 (N.D. Cal. Apr. 25, 2012) ("although the Agreement was a contract of adhesion that Fouts had no opportunity to modify, the arbitration clauses are not hidden in the text but are written in the same typeface as the rest of the agreement, with clear headings to explain each section."). Varela has not suggested that he was in any way coerced or duped into signing the arbitration agreement, or urged not to read or ask questions about any of the forms he signed. *See Ulbrich v. Overstock.Com, Inc.*, 887 F. Supp. 2d 924, 932 (N.D. Cal. 2012); *see also Employee Painters' Trust v. J & B Finishes*, 77 F.3d 1188, 1192 (9th Cir.

1996) ("A party who signs a written agreement is bound by its terms, even though the party neither reads the agreement nor considers the legal consequences of signing it.").

Under the terms of the Agreement, Varela had three days in which to revoke the Agreement after signing it. The Ninth Circuit has observed that providing an employee with three days to *consider* the terms of an arbitration agreement is "irrelevant" where the employee has no other options available. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) ("when a party who enjoys greater bargaining power than another party presents the weaker party with a contract without a meaningful opportunity to negotiate, oppression and, therefore, procedural unconscionability, are present.") (internal citations and quotation marks omitted). In this case, it is not clear what options Varela would have had if he had chosen to invoke the revocation clause during the three-day window, given that Lamps Plus does not contest that signing an arbitration agreement was a condition of employment. Under the circumstances, it does not appear that the three-day revocation window provided Varela with any additional ability to negotiate.

Because the Arbitration Agreement was written by Lamps Plus, Varela was required to sign it as a condition of employment, and Varela had no meaningful opportunity to negotiate, it is a contract of adhesion and some measure of procedural unconscionability is therefore present. Nonetheless, the terms of the stand-alone agreement were very clear and there was no evident pressure not to read the forms or ask questions about them. Thus, the

level of procedural unconscionability is "minimal." *See Nagrampa*, 469 F.3d at 1284.

2. Substantive Unconscionability

Varela contends that the Agreement is substantively unconscionable in part because the "fee-splitting" arrangement is "riddled with inconsistencies" in that it provides that Lamps Plus will pay for the cost of the arbitration, but also states that the Agreement does not include the costs for the filing fee if the employee initiates the arbitration, and that each party is responsible for paying for their own attorney's fees. (Opp. at 12.)

Varela's arguments are not well taken. Regardless of whether Varela resolves his dispute in court or in arbitration, he will be required to pay for his own attorney's fees. *See, e.g., Coleman v. Jenny Craig, Inc.*, No. 11CV1301-MMA DHB, 2012 WL 3140299, at *4 (S.D. Cal. May 15, 2012) (arbitration agreement including provision that each party be responsible for paying its own costs, including attorneys' fees, valid where it "preserves the same allocation of costs that a litigant would face if he filed in court."); *Fouts*, 2012 WL 1438817, at *4 (arbitration agreement requiring employee to pay own attorney's fees was valid). Similarly, the Arbitration Agreement requires the grievant to pay the cost of a filing fee regardless of whether his claims are brought in court or before an arbitrator. The Agreement imposes no greater cost on Varela than he would face in the absence of such an Agreement. Attorneys' fees and filing fees are generally distinguishable from the "costs of arbitration" which include forum fees and arbitrators' expenses. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 102, 99 Cal. Rptr.2d 745 (2000). The Agreement states that such

additional costs of arbitration will be paid by Lamps Plus, while Varela will bear responsibility for the types of costs and fees that he would pay regardless of the forum. This is entirely permissible.

Varela also asserts that the arbitration agreement is substantively unconscionable because it contains a provision permitting the parties to seek injunctive relief and "Lamps Plus is the more likely party to seek injunctive relief." (Opp. at 11). "An agreement may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party." *Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 843 (N.D. Cal. 2012) (citing *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88 (2004)). California courts have found that when an arbitration agreement permits *only* injunctive relief, this may unconscionably favor the employer, because an employer is more likely to seek injunctive relief. *See Lara*, 896 F. Supp. at 843 (collecting cases). That is not the case here. The Agreement states that the Arbitrator may award any remedy allowed by applicable law, including injunctive relief, and merely specifies that this does not prohibit the parties from going to court to seek injunctive relief as well. Both parties are entitled to any and all appropriate relief, and the availability of injunctive relief does not render the Agreement substantively unconscionable.

Finally, Varela contends that the arbitration agreement provides for "extremely limited" discovery. (Opp. at 12, n.7). Limitations on discovery do not necessarily render an Agreement substantively unconscionable. *See Morgan v. Xerox Corp.*, No. 2:13-

CV-00409-TLN-AC, 2013 WL 2151656, at *5 (E.D. Cal. May 16, 2013) ("even if Plaintiff's contention that discovery may be *potentially* limited is correct, that does not render the agreement substantively unconscionable."); *see also Armendariz*, 24 Cal. 4th at 106 ("lack of discovery is not grounds for holding a .... claim inarbitrable.").

Under the Lamps Plus Rules, each party has the right to depose one witness as well as any expert designated by the parties. The claims at issue are complex, and it is possible that this amount of discovery will prove inadequate. The Rules provide, however, that the arbitrator may order additional discovery upon a showing of substantial need. This safeguard is adequate to remedy any undue curtailment of necessary discovery. *See Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 984, 104 Cal. Rptr. 3d 341, 349 (2010) (giving arbitrator broad discretion over discovery does not render an arbitration agreement unconscionable) (collecting cases); *see also Stover-Davis v. Aetna Life Ins. Co.*, No. 1:15-CV-1938-BAM, 2016 WL 2756848, at *8 (E.D. Cal. May 12, 2016) (limitations on discovery do not render an arbitration provision unconscionable, particularly where arbitrator is authorized to increase discovery limits upon a showing of necessity).

The Arbitration Agreement is not substantively unconscionable, and raises only the most minimal concerns about procedural unconscionability. It will therefore not be invalidated on this basis.

3. Class Action Arbitration

Lamps Plus contends that arbitration should be compelled on an individual basis, asserting that there is no contractual basis for finding that the par-

ties intended to arbitrate on a class-wide basis. Varela responds that the Arbitration Agreement does not waive class-wide arbitration, and that the language stating that "all claims" arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter. Varela therefore contends that, if his individual claims are subject to arbitration, so are the class claims.

The Supreme Court has held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (emphasis in original). Where an arbitration clause is "silent" as to class arbitration, "the parties cannot be compelled to submit their dispute to class arbitration." *Id.* at 687. In *Stolt-Nielsen*, however, the parties expressly stipulated that there was "no agreement" as to the issue of class arbitration. *Id.* at 668-69, 687. Courts have therefore limited *Stolt-Nielsen* to cases where an arbitration agreement is "silent in the sense that [the parties] had not reached any agreement on the issue of class arbitration, not simply ... that the clause made no express reference to class arbitration." *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1011 (N.D. Cal. 2011) (internal citations and quotations omitted). The "failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the 'silence' discussed in *Stolt-Nielsen*." *Vazquez v. ServiceMaster Global Holding, Inc.*, 2011 WL 2565574 at *3 n.1 (N.D. Cal. June 29, 2011).

The lack of an explicit mention of class arbitration here does not constitute the "silence" contemplated in *Stolt-Nielsen*, as the parties did not affirmatively agree to a waiver of class claims in arbitration. Indeed, such a waiver in the employment context would likely not be enforceable. *See Lewis v. Epic Sys. Corp.*, __ F.3d __, 2016 WL 3029464 (7th Cir. May 26, 2016) (class action waiver violates Section 7 of the National Labor Relations Act ("NLRA")); *Totten v. Kellogg Brown & Root, LLC*, 2016 WL 316019 (C.D. Cal. Jan. 22, 2016) (same); *but see D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (class action waiver does not violate NLRA).

In addition to the dubious enforceability of a class arbitration waiver in the employment context, the Court agrees with Varela that the language of the Arbitration Agreement is at least ambiguous as to class claims. The Court therefore construes the ambiguity against the drafter and finds that the parties may proceed to arbitrate class claims. *See Jacobs v. Fire Ins. Exch.*, 36 Cal. App. 4th 1258, 1281, 42 Cal. Rptr. 2d 906, 921 (1995) (the drafter of an adhesion contract must be held responsible for any ambiguity in the agreement).

C. Request for leave to conduct discovery on arbitration issues

Varela has requested leave to conduct limited discovery on arbitration-related issues. (Opp. at 15). The Court denies Varela's request, because Varela has not identified what type of facts he would seek, and the Court has sufficient facts to make its determination on the motion to compel arbitration.

D. Motion to Dismiss

Lamps Plus's motion to dismiss is premised in the alternative, as its primary contention is that Varela's claims are subject to arbitration. (MTC at 11). Given that the Court is granting the motion to compel arbitration, all of Varela's claims against Lamps Plus are dismissed without prejudice. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (dismissal of claims subject to arbitration clause is appropriate).

V.
CONCLUSION

In light of the foregoing, Lamps Plus motion to compel arbitration is **GRANTED**, and its motion to dismiss is **GRANTED** without prejudice.

IT IS SO ORDERED.

APPENDIX D

Lamps Plus is considering you as a prospective employee. Part of our employment practice is agreeing to abide by the terms in the Arbitration Agreement. Please read this agreement and be willing to sign it if an employment offer is made. Thank you for your cooperation.

LAMPS PLUS, INC.

ARBITRATION PROVISION

Except as provided below, the parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, that are not resolved by their mutual agreement shall be resolved by final and binding arbitration as the exclusive remedy.

I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

Claims Covered by the Arbitration Provision

The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually con-

sent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement. The only claims that are arbitrable are those that, in the absence of this Agreement, would have been available to the parties by law. The claims covered by this Agreement include, but are not limited to, claims for discrimination or harassment based on race, sex, sexual orientation, religion, national origin, age, marital status, or medical condition or disability (including claims under the California Fair Employment and Housing Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and any other local, state or federal law concerning employment or employment discrimination). This agreement does not affect the Employee's right to seek relief through the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing.

The Arbitration Process

Either party may commence the arbitration process by filing a written demand for arbitration with J.A.M.S/ENDISPUTE ("J.A.M.S.") or the American Arbitration Association ("AAA") and sending a copy by personal delivery or certified mail to the other party. In the event I initiate the arbitration process, I will send the notice to the Human Resources Department. If the Company initiates arbitration, it will send the notice to my last known residence address as reflected in my personnel file. The Company and I agree that, except as provided in this Agreement, the arbitration shall be in accordance with the AAA's then-current National Rules for the Resolu-

tion of Employment Disputes (if AAA is designated) or the then-current J.A.M.S. Arbitration Rules and Procedures for Employment Disputes (if J.A.M.S. is designated). The arbitration shall be conducted by one arbitrator ("the Arbitrator") selected pursuance to the selection procedures provided by J.A.M.S. or AAA or by an arbitrator mutually selected by the parties.

The Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the State of California, or federal law, or both, as applicable to the claim(s) asserted. The Arbitrator is without jurisdiction to apply any different substantive law, or law of remedies. The Arbitrator is authorized to award any remedy allowed by applicable law. The Arbitrator shall not have the power to modify any of the provisions of this Agreement. The Arbitrator shall issue a written and signed statement of the basis of his or her decision, including findings of fact and conclusions of law. The statement and award, if any, shall be based on the terms of this Agreement, the findings of fact and the statutory and decisional case law applicable to this dispute. Proceedings to enforce, confirm, modify, set aside or vacate an award or decision rendered by the Arbitrator will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 et seq, or applicable state law. Nothing in this paragraph shall prohibit or limit the parties from seeking injunctive relief in lieu of or in addition to arbitration at any time directly from a Court of competent jurisdiction. The arbitration shall be final and binding upon the parties, except as provided in this Agreement.

Arbitration Fees and Costs

The Company agrees to pay all fees associated with the arbitration that are unique to arbitration including the cost of the arbitrator. These costs do not include the initial filing fee if I initiate the arbitration costs or the cost of discovery, expert witnesses, or other costs which I would have been required to bear had the matter been filed in a court. The costs of arbitration are borne by the Company. The parties will be responsible for paying their own attorney's fees, except as otherwise required by law and determined by the arbitrator in accord with applicable law.

Voluntary Agreement

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT, THAT I UNDERSTAND ITS TERMS, THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN IT, AND THAT I HAVE ENTERED INTO THE AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF. I UNDERSTAND THAT I HAVE THREE (3) DAYS FOLLOWING THE SIGNING OF THIS AGREEMENT TO REVOKE THIS AGREEMENT AND THAT THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED.

I ACKNOWLEDGE THAT I HAVE BEEN ADVISED TO CONSULT WITH LEGAL COUNSEL BEFORE SIGNING THIS AGREEMENT. I UN-

DERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO FILE A LAWSUIT IN A COURT OF LAW AND TO HAVE MY CASE HEARD BY A JUDGE AND/OR JURY.

THE EMPLOYEE	LAMPS PLUS
Frank R. Varela III	*/s/ Kathy Tomlinson*
Employee's Name	
/s/ Frank R. Varela III	4.09.07
Employee's Signature	Date

ATTACHMENT A
LAMPS PLUS EMPLOYMENT ARBITRATION RULES AND PROCEDURES

1. **Federal Arbitration Act**: Except as provided in this Agreement, the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, California law pertaining to agreements to arbitrate shall apply.

2. **Arbitration Procedures**: A. The arbitration will be conducted by Judicial Arbitration & Mediation Services, Inc. ("J.A.M.S."). The Company and I agree that, except as provided in this agreement, the arbitration shall be in accordance with the then-current J.A.M.S. Employment Arbitration Rules. The arbitrator shall be either a retired judge, or an attorney licensed to practice law in the state in which the arbitration is convened. The arbitration shall take place in or near the city in which the Employee is or was last employed by the Company.

B. The arbitrator shall be selected as follows. J.A.M.S. shall give each party a list of 10 arbitrators drawn from its panel of employment dispute arbitrators. Each party may strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the arbitrator. If more than one common name remains on the lists of all parties, the parties shall strike names alternately from the list of common names until only one remains. The party who did not initiate the claim shall strike first. If no common name exists on the lists of all parties, the sponsoring organization shall furnish an addi-

tional list and the process shall be repeated. If no arbitrator has been selected after two lists have been distributed, then the parties shall strike alternately from a third list, with the party initiating the claim striking first, until only one name remains. That person shall be designated as the arbitrator.

C. The arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted. The arbitrator is without jurisdiction to apply any different substantive law, or law of remedies. The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable. The arbitration shall be final and binding upon the parties, except as provided in this Agreement.

D. The arbitrator shall have jurisdiction to hear and rule on pre-hearing disputes and is authorized to hold the prehearing conferences by telephone or in person, as the arbitrator deems necessary. The arbitrator shall have the authority to entertain a notice to dismiss and/or a motion for summary judgement by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedures.

E. Either party, at its expense, may arrange for and pay the cost of a court reporter to provide a stenographic record of proceedings.

F. Either party, upon request at the close of hearing, shall be given leave to file a post-hearing

brief. The time for filing such a brief shall be set by the arbitrator.

H. Either party shall have the right, within 20 days of issuance of the arbitrator's proposed opinion, to file with the arbitrator a motion to reconsider (accompanied by a supporting brief) where the party believes that the arbitrator's award violates public policy and/or the applicable arbitration procedures set forth herein and by J.A.M.S. The other party shall have 20 days from the date of the motion to respond. The arbitrator thereupon shall reconsider the issues raised by the motion and, promptly, either confirm or change the decision, which (except as provided by this Agreement) shall then be final and conclusive upon the parties. The costs of such a motion for reconsideration and written opinion of the arbitrator shall be borne by the party prevailing on the motion, unless the arbitrator orders otherwise.

3. **Hearing Date**: The arbitrator will promptly set a hearing date and time, and will mail written notice to each of the parties at least sixty (60) days in advance of the hearing unless the parties otherwise agree or mutually waive notice.

4. **Pleadings**: Formal pleadings are not required. However, the party initiating the claim shall put J.A.M.S. and the responding party on notice of the claims asserted and include a short and plain statement of (1) the factual and legal bases for the claims, and (2) the amount of damages being sought and a description of any other relief being sought.

5. **Discovery**: A. Witnesses/Documents: At least thirty (30) days before the arbitration, the parties shall exchange lists of witnesses, including any experts, as well as copies of all exhibits intended to be

used at the hearing. The arbitrator shall have discretion to order earlier and additional pre-hearing exchange of information.

B. Deposition: Each party shall have the right to take the deposition of one individual as well as any expert designated by either party.

C. Document Production: Each party shall have the right to require production of relevant documents from the other party.

D. Other Discovery: No other discovery shall be had, except upon order of the arbitrator and upon a showing of substantial need.

E. Discovery Motions: The arbitrator will establish an informal procedure to resolve discovery disputes. The procedure may include presentation of motions by letter as opposed to formal pleadings. Service of motions by facsimile transmission and rulings by telephonic conference calls also may be permitted at the arbitrator's discretion.

F. Subpoenas: The subpoena rights under Rule 7(D) shall apply to discovery.

G. Dispositive Motions: The Arbitrator shall have the jurisdiction and power to entertain a motion to dismiss and/or motion for summary judgement by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedures.

H. Fees: The fees, costs and expenses of J.A.M.S. and the arbitrator shall be allocated between the parties as provided in Section 6 of the Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement").

6. **Briefs**: Concise pre-arbitration briefs are encouraged. Any such brief shall be filed and served ten (10) days before the arbitration date. Either party, upon request at the close of the hearing, may be given leave to file a post-hearing brief. The time for filing such a brief shall be set by the arbitrator. Reply briefs may not be filed unless the arbitrator specifies to the contrary at the close of the hearing. Briefs are limited to thirty (30) pages.

7. **The Arbitration Hearing**: A. Conduct of Hearing. The arbitrator shall preside at the hearing and rule on the admission and exclusion of evidence as well as questions of procedure, and may exercise all other powers conferred upon the arbitrator by the parties herein in the Arbitration Agreement. The hearing will be conducted as if it were an informal court trial. Proceedings may be adjourned from time to time.

B. Representation: Any party may be represented by an attorney or other representative selected by the party.

C. Attendance of Witnesses and Production of Evidence: The arbitrator may issue subpoenas for the attendance of witnesses and the production of documents for the hearing.

D. Order of Proof: The order of proof should generally follow that of a typical court trial, including an opportunity to make opening statements and closing arguments.

E. Presentation of Evidence: Judicial rules relating to the order of proof, the conduct of the hearing and the presentation and admissibility of evidence will not be applicable. Any relevant evidence, including hearsay, shall be admitted by the arbitra-

tor if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law.

F. Law: The arbitrator shall apply the substantive law and the law of remedies, if applicable, of the state in which the claim arose, or federal law or both, as may be applicable to the claim(s) being asserted.

G. Ancillary Services: Any party desiring a stenographic record may hire a court reporter to attend the proceedings. The same applies to any party desiring an interpreter. The requesting party must notify the other parties of the arrangements in advance of the hearing and must pay the costs incurred. If the other party desires a copy of the transcript, it shall be made available, but in that event the reporter's total charges shall be shared equally by all parties.

H. Payment of Attorney and Witness Expenses: Each party shall pay its own attorney's fees, witness fees and other expenses incurred for its own benefit, unless otherwise provided by contract or statute.

I. Arbitration in the Absence of a Party or Representative: The arbitration may proceed in the absence of any party or representative who, after due notice, fails to appear or fails to obtain a continuance. In such case, the arbitrator shall rule against the absent party.

J. Serving Notice: Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith or for the entry

of judgement on any award made under these rules, may be personally served or mailed to the party or its representative at the last known address, provided that a reasonable opportunity to be heard with regard to the processing has been granted to the party. The arbitrator may allow, and/or the parties may consent to, the use of facsimile transmission (FAX, telex, telegram, or other written forms of electronic communication to give notices required by these rules).

K. Waiver of Rules: Any party who proceeds with arbitration with knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object.

L. Jurisdiction: The arbitrator has the authority to resolve any dispute relating to the formation, interpretation, applicability or enforceability of the Arbitration Agreement.

8. **Award**: The arbitrator shall make the award and issue an opinion in the written form typically rendered in labor arbitration as soon as possible, and in no case more than thirty (30) days, after the close of evidence or the submission of posthearing briefs, whichever is later. The arbitrator may grant any remedy or relief, legal or equitable, that would have been available had the claim been asserted in court. The award shall include a brief statement of the factual and legal bases for the ruling.

No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., *ET AL.*

Petitioners,

v.

FRANK VARELA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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March 2018

QUESTIONS PRESENTED

1. Did the court of appeals err in construing the distinctive language of the arbitration agreement at issue in this case to authorize class arbitration?

2. Did the court of appeals have appellate jurisdiction over the petitioners' appeal of the district court's order granting their motion to compel arbitration, directing arbitration to proceed, and dismissing respondent's claims without prejudice?

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INTRODUCTION

In this case, a panel of the court of appeals, in an unpublished, non-precedential decision, followed this Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), that "a party may not be compelled under the F[edera] A[rbitration] A[ct] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684. To determine whether there was a contractual basis for class arbitration, the court, consistent with *Stolt-Nielsen* and other Federal Arbitration Act ("FAA") precedents, applied generally applicable principles of California contract law to the specific language of the particular arbitration agreement before it, and concluded that the contract permitted class arbitration. The court accordingly affirmed a district court decision compelling arbitration of the parties' underlying dispute, including claims asserted on a class basis (should the arbitrator decide to certify a class).

Such a factbound application of contract law principles within the framework of federal arbitration law established by this Court does not merit further review. The decision creates no intercircuit conflict and does not threaten to impose class arbitration wholesale on parties who did not agree to it. It offers only a reasonable interpretation of a single contract to determine the parties' intent in light of background principles of state contract law.

Those reasons are more than sufficient to warrant denial of the petition for a writ of certiorari. But there is another barrier to review in this case: a substantial question whether this case was properly in the court of appeals to begin with. The jurisdictional

statute applicable to orders concerning arbitration, 9 U.S.C. § 16, provides that "[a]n appeal may be taken from ... an order ... *denying* a petition under section 3 of this title to order arbitration to proceed." *Id.* § 16(a)(1)(B). In the absence of a certification order under 28 U.S.C. § 1292(b), however, "an appeal may *not* be taken from an interlocutory order ... *directing arbitration to proceed* under section 4 of this title." *Id.* § 16(b)(2) (emphasis added). Here, the district court's order *granted* petitioners' motion to compel arbitration and directed arbitration to proceed, and there was no § 1292(b) certification. The case thus falls outside the scope of appellate jurisdiction over interlocutory orders regarding arbitration.

Although the district court also dismissed *respondent's* claims without prejudice pending arbitration, that order, which petitioners actively sought, does not itself aggrieve petitioners or provide them standing to appeal. *Cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). And if the court of appeals lacked jurisdiction to decide the merits, this Court likewise has no jurisdiction to do so: This Court's jurisdiction is limited to cases properly "in" the court of appeals, 28 U.S.C. § 1254, and it has no jurisdiction under § 1254 to decide issues that fall outside the scope of the lower courts' appellate jurisdiction. *See, e.g., Will v. Hallock*, 546 U.S. 345, 349 (2006).

The case's jurisdictional posture underscores the inadvisability of granting review of a factbound challenge to a correct interpretation of a single contract. Other considerations also weigh against review.

First, the dispute between the parties has not been finally resolved, and it is possible that a class will never be certified or that the claims will be re-

solved in a way that moots any question of class proceedings. The lack of finality, together with the possibility of review at some later stage of the case should it become warranted, is a strong reason for the Court to avoid taking up this case. Second, the case implicates other potentially dispositive issues not addressed by the court of appeals, rendering it a particularly poor candidate for review. Finally, the issue raised is of rapidly diminishing importance in view of the dramatic increase in the use of arbitration provisions that incorporate express prohibitions on class proceedings.

STATEMENT

Respondent Frank Varela has been an employee of petitioner Lamps Plus, Inc., since 2007. In March 2016, Lamps Plus allowed a criminal to gain access to copies of W-2 income and tax withholding statements of approximately 1,300 of its employees, including Mr. Varela. As a result, a fraudulent 2015 federal income tax return was filed in Mr. Varela's name.

Mr. Varela filed suit in the United States District Court for the Central District of California against Lamps Plus, Inc., and two related corporations (collectively referred to herein as "Lamps Plus") asserting federal and state-law claims on behalf of a class consisting of current and former employees of Lamps Plus and others injured by the information breach. Lamps Plus moved to compel arbitration under the terms of an arbitration agreement in Mr. Varela's employment agreement, which provides for arbitration of "all claims that may ... arise in connection with [his] employment." Pet. App. 25a. The arbitration provision further provides (among other things)

that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment," *id.* at 24a, that all claims "that, in the absence of this Agreement, would have been available to the parties by law" are arbitrable, and that the arbitrator "is authorized to award any remedy allowed by applicable law," *id.* at 26a.

Lamps Plus contended that the agreement authorized arbitration only of Mr. Varela's individual claims and did not permit him to assert claims on behalf of a class either in court or in arbitration. Simultaneously, Lamps Plus also moved for dismissal of all Mr. Varela's claims. Mr. Varela opposed arbitration on numerous grounds, including that his claims were outside the scope of the agreement and that the agreement was unconscionable under California law. He also contended that, if arbitration were to proceed, he should be allowed to seek to represent a class in the arbitration.

The district court granted Lamps Plus's motion to compel arbitration over Mr. Varela's objections. The court concluded that the dispute arose in connection with his employment and thus was within the scope of the arbitration agreement. With respect to unconscionability, the court found that the agreement was procedurally unconscionable because it was a contract of adhesion imposed on him as a condition of employment. However, the court found that the agreement was not substantively unconscionable because it did not impose excessive fees on Mr. Varela, its remedial provisions were not unfairly one-sided, and its limits on discovery did not unduly curtail necessary discovery.

The court, however, ruled that the agreement authorized class arbitration and thus declined to limit its order compelling arbitration to Mr. Varela's individual claims. The court recognized that under *Stolt-Nielsen*, a party may not be compelled to participate in class arbitration absent a contractual basis for concluding that it agreed to do so. Pet. App. 21a. The court found, however, that the language of the agreement was ambiguous as to whether it allowed arbitration of class claims. Construing that ambiguity against the drafter of the agreement, Lamps Plus, the court concluded that there was a contractual basis for class arbitration. *Id.* at 22a. The court also observed that a waiver of class claims "in the employment context would likely not be enforceable" under the National Labor Relations Act ("NLRA"). *Id.* (citing *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017)).

Based on these conclusions, the court granted Lamps Plus's motion to compel arbitration, and, in light of that ruling, granted its motion to dismiss Mr. Varela's claims, without prejudice. Pet. App. 23a.

Lamps Plus appealed the court's ruling in its favor to the Ninth Circuit, arguing that it was aggrieved by the court's refusal to limit its order compelling arbitration to Mr. Varela's individual claims. Mr. Varela contended that the district court had properly construed the agreement to authorize class arbitration. In addition, relying on the Ninth Circuit's decision in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017), which postdated the district court's decision, Mr. Varela argued that the agreement would be unlawful under the NLRA if it allowed only individual arbitration.

The Ninth Circuit affirmed in an unpublished, non-precedential opinion, finding that the parties had agreed to class arbitration. Pet. App. 2a. The court began by recognizing that, under *Stolt-Nielsen*, parties may be compelled to arbitrate on a class basis only if they have contractually agreed to do so. *Id.* The court also recognized that the agreement's failure to mention class arbitration expressly was not dispositive under *Stolt-Nielsen*; rather, the question was whether their contract was properly interpreted to reflect agreement on class arbitration. *Id.*

To determine whether the contract permitted class arbitration, the court applied "state-law contract principles," which govern interpretation of arbitration agreements. *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Consistent with California contract-law principles, the court first considered the text of the contract and found it ambiguous. The court focused particular attention on the contract's distinctive language providing for arbitration "in lieu of any and all lawsuits or other civil legal proceedings," together with other broad language including permission to assert all "claims that would have been available to the parties by law." Pet. App. 3a–4a. The court pointed out that class claims would have been available to respondent in court, and that "class proceedings" are encompassed in the phrase "civil legal proceedings." *Id.* Although the court did not find that the contractual language on its face unambiguously permitted class proceedings, it concluded that its terms, taken together, "can be reasonably read to allow for class arbitration." *Id.* at 3a.

Because the contract was "capable of two or more constructions, both of which are reasonable," *id.*

(quoting *Powerine Oil Co. v. Super. Ct.*, 118 P.3d 589, 598 (Cal. 2005)), the court applied the California contract-law principle that "[a]mbiguity is construed against the drafter" of a contract, *id.*—"a rule that 'applies with peculiar force in the case of a contract of adhesion,'" *id.* (quoting *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016)). The court therefore concluded that "the construction posited by Varela"—*i.e.*, "that the ambiguous Agreement permits class arbitration"—was proper under California contract law and supplied "the necessary 'contractual basis' for agreement to class arbitration" under *Stolt-Nielsen*. *Id.* at 4a–5a.

Judge Fernandez filed a two-sentence dissenting statement. All the members of the panel, however, voted to deny Lamps Plus's petition for panel rehearing and either voted to deny or recommended denial of its petition for rehearing en banc. No judge of the Ninth Circuit requested a vote on the petition for rehearing en banc.

REASONS FOR DENYING THE WRIT

I. The court of appeals' construction of the arbitration agreement in this case does not present an issue meriting review.

A. The lower court's decision that there is a contractual basis for class arbitration correctly applies both the FAA as construed in *Stolt-Nielsen* and the state contract-law principles that govern construction of arbitration agreements.

The court of appeals' decision followed exactly the course laid down by this Court for determining whether an arbitration agreement authorizes class

proceedings: It applied the FAA-based principle that class arbitration is permissible only if there is a contractual basis for it, and it then turned to generally applicable state contract law to ascertain whether such a contractual basis existed. Although Lamps Plus attempts to characterize its petition as raising a question of federal law, its argument for further review is fundamentally an assertion that the court erred in determining whether the contract authorizes class arbitration. Such a fact-specific challenge to a non-precedential application of state contract law is not suitable for review by this Court.

This Court has repeatedly held that the determination of the scope of arbitration under an agreement subject to the FAA is a matter of contract construction governed by "ordinary state-law principles" of contract law. *First Options*, 514 U.S. at 944. As the Court put it in *Stolt-Nielsen*, "the interpretation of an arbitration agreement is generally a matter of state law." 559 U.S. at 681.

Where the question is whether an arbitration agreement permits class arbitration, *Stolt-Nielsen* holds that the FAA displaces otherwise applicable state law only if, and to the extent that, state law would impose class arbitration for policy reasons rather than on the basis of contract-law principles that "give effect to the contractual rights and expectations of the parties." *Id.* at 682 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)). Thus, under *Stolt-Nielsen*, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684. The Court reiterated this statement of *Stolt-Nielsen*'s holding in *Oxford Health Plans LLC v.*

Sutter, 569 U.S. 564, 567 (2013), and it emphasized the limits on that holding by explaining that the Court had "overturned the arbitral decision [in *Stolt-Nielsen*] because it lacked *any* contractual basis for ordering class procedures." *Id.* at 571.

In holding that class arbitration must have a contractual basis beyond the mere existence of an agreement to arbitrate, *Stolt-Nielsen* in no way suggests that the Court was displacing the state contract-law principles that, under the FAA, normally govern whether a proffered construction of an arbitration agreement has a contractual basis. Indeed, *Stolt-Nielsen*'s citation of *Volt* for the proposition that class arbitration is a matter of the "contractual rights and expectations of the parties," 559 U.S. at 682 (quoting 489 U.S. at 479), indicates that state law retains its primary role, because one of the key holdings of *Volt* is that determining the extent of those contractual rights and expectations is a matter of state law. *See* 489 U.S. at 474. Nothing in *Stolt-Nielsen* indicates that in requiring a contractual basis for class arbitration, the Court also silently required the creation of a new federal common law of contracts to replace state law in determining whether such a contractual basis exists.

Consistent with *Stolt-Nielsen*, the panel in this case acknowledged that class arbitration would be permissible only if it had a contractual basis—that is, if the parties agreed to it. Pet. App. 2a. The court also recognized, consistent with both *Stolt-Nielsen* and *Oxford Health Plans*, that the absence of express language in the agreement was not determinative of

this point. *See id.*[1] The panel therefore turned to state-law contract principles to determine whether the agreement was properly interpreted to authorize class arbitration. *See id.* It carefully parsed the contractual language and found ambiguity on the basis of multiple provisions indicating that class proceedings, like other all other "civil legal proceedings," could reasonably be understood to be within the scope of arbitration under the agreement. *Id.* at 3a–4a. And it turned to the well-established California contract-law principle of construing ambiguous provisions against the drafter to resolve their ambiguity. *Id.* at 3a–5a.

The panel's decision thus fully respects *Stolt-Nielsen*'s holding that class arbitration requires a contractual basis, as well as the longstanding principle that state contract law defines the "contractual rights and expectations of the parties," *Volt*, 489 U.S. at 479), and determines whether a contractual basis for class arbitration exists. The panel's reliance on the principle of construing ambiguous provisions against the drafter is consistent with governing state law, and this Court has specifically endorsed application of that state-law principle in determining the intentions of the parties to an arbitration agreement. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–63 & nn. 9–10 (1995).

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[1] Lamps Plus does not appear to contend that the panel erred in recognizing that *Stolt-Nielsen* does not require an *express* reference to class arbitration. *Oxford Health Plans*, where the contract likewise did not expressly mention class arbitration, rules out any possibility that *Stolt-Nielsen* requires an express contractual reference to class arbitration.

The court of appeals' application of state-law contract principles to construe the distinctive language of a specific agreement—a decision that has no precedential effect and could not in any event have controlling force on state-law matters—does not merit review by this Court. This Court has emphasized that it "does not sit to review" the "question[s] of state law" implicated in "interpretation of private contracts," including arbitration agreements. *Volt*, 489 U.S. at 474. The contention that the court of appeals misconstrued the contract in this case raises exactly such a question.

B. The court of appeals' decision does not conflict with this Court's precedents.

1. Lamps Plus acknowledges that the decision below correctly stated *Stolt-Nielsen*'s holding and held that the required contractual basis for class arbitration was present here. Pet. 13. But Lamps Plus argues that the decision effectively "renders *Stolt-Nielsen* a nullity" by relying on reasoning under which "*any* arbitration agreement" without an express class-action prohibition could be said to authorize class arbitration. *Id.* According to Lamps Plus, the decision below is therefore contrary to *Stolt-Nielsen*'s holding that an "implicit agreement to authorize class-action arbitration" cannot be "infer[red] solely from the fact of the parties' agreement to arbitrate." 559 U.S. at 685; *see* Pet. 13–14.

The court of appeals did not, however, infer agreement to class arbitration solely from features that are common to all arbitration agreements, as Lamps Plus contends. Nowhere in the court of appeals' opinion does the court suggest that any of the particular provisions of the agreement that Lamps

Plus argues are inherent in all arbitration agreements (such as waiver of a right to a jury, Pet. 13), would by itself create ambiguity as to whether class proceedings are authorized. Rather than analyzing particular clauses in isolation, as Lamps Plus does, the court looked at the agreement as a whole and found that its unique *combination* of provisions indicating the arbitrability of all forms of "civil legal proceedings," as well as all "claims that would have been available to the parties" and "any remedy" that would be allowed for such claims, created ambiguity. *See* Pet. App. 3a–4a.

Lamps Plus's assertion that this language, viewed as a whole, means nothing more than what is inherent in any arbitration agreement is unfounded. At most, Lamps Plus's arguments suggest that no one phrase in the agreement, by itself, clearly means that class arbitration is available. In other words, Lamps Plus's arguments amount to no more than an assertion that the passages in isolation do not *unambiguously* provide that class arbitration is available. Lamps Plus's efforts to demonstrate that the language can be read differently from the way the court of appeals read it only underscore the correctness of the court's holding that the contract is ambiguous.[2]

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[2] Lamps Plus's assertion that the court of appeals' reliance on the language regarding "civil legal *proceedings*" must be incorrect because it implies that all "*procedures*" applicable in court would necessarily apply in arbitration, Pet. 14, is particularly unpersuasive because of its confusion of two different terms. Moreover, the contractual language cited by the court could not create ambiguity as to whether civil discovery procedures would apply in arbitration, *see id.*, because the agreement expressly addresses discovery and other procedural matters, *see*

(*Footnote continued*)

Lamps Plus's arguments also overlook that this Court has already held that *Stolt-Nielsen* is not "nullified" by contractual interpretations that are based on the breadth of an arbitration clause's terms. In *Oxford Health Plans*, an arbitrator found an agreement to class arbitration based on language providing for arbitration of all disputes that could be presented in a "civil action." 569 U.S. at 566. The petitioner there, like Lamps Plus here, argued that such a construction was directly contrary to *Stolt-Nielsen*'s prohibition on finding agreement to authorize class arbitration solely from the fact of an agreement to arbitrate. *See Oxford Health Plans*, Br. for Pet'r i, 18, 22, 39; Reply Br. 1. This Court, however, rejected the argument that the arbitrator's interpretation exceeded his authority under *Stolt-Nielsen*. *See* 569 U.S. at 570–72.

The Court's ultimate disposition of the case, to be sure, also rested on its view that the *sufficiency* of the arbitrator's contract construction was not subject to judicial review (a limitation not applicable to review of a court's determination). *See id.* at 571–72. But if the arbitrator's decision had nullified *Stolt-Nielsen* by inferring agreement to class arbitration solely from an agreement to arbitrate—something *Stolt-Nielsen* specifically held was beyond the power of an arbitrator, *see* 559 U.S. at 685—the outcome would have been different. And if the arbitrator's ruling in *Oxford Health Plans* did not violate *Stolt-*

Pet. App. 29a–35a. By contrast, reading the agreement to authorize class arbitration proceedings does not contradict its procedural provisions, which incorporate AAA and JAMS rules, *see* Pet. App. 25a–26a, that provide for class proceedings where authorized by the parties' agreement.

Nielsen's prohibition on inferring agreement to class arbitration solely from agreement to arbitrate, it follows that the court's decision here, which had a much more extensive textual basis, also did not "nullify" *Stolt-Nielsen*.

2. Lamps Plus's argument that the lower court's application of state-law contract principles is contrary to this Court's precedents, because it reflects impermissible "hostility" to arbitration, is likewise misguided. An application of state-law contract principles to an arbitration agreement may be preempted by the FAA if a state court "would not interpret contracts other than arbitration contracts the same way." *DIRECTV v. Imburgia*, 136 S. Ct. 463, 469 (2015). But Lamps Plus's factbound arguments that the court of appeals was wrong in interpreting this contract fall far short of demonstrating that only hostility toward arbitration could account for the court's ruling, or that it would not have found similar ambiguities in another type of contract. Nor is there anything in the court's ruling that "is too tailor-made to arbitration agreements" to pass muster under the FAA. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017).

Lamps Plus's citation to California state-court decisions that found no ambiguity as to the availability of class arbitration under other arbitration agreements, *see* Pet. 17–18, adds nothing to its claim that the decision below reflects impermissible hostility to arbitration. The decisions Lamps Plus cites involved agreements that used materially different language that focused much more clearly on the individual claims of the plaintiff. *See* Pet. 17. Lamps Plus points to nothing in those decisions that addresses language similar to that which the panel below considered de-

cisive in its determination that the agreement in this case is ambiguous.

Lamps Plus's invocation of the California state-court decisions only demonstrates that the principles of California contract law applied below are not hostile to arbitration and do not lead to determinations that class arbitration is authorized solely because parties have agreed to arbitrate. The decisions also underscore that review of the court of appeals' application of state-law contract principles is an unsound use of this Court's decisional resources because only the state courts can authoritatively determine how those principles apply to any particular contractual language. If, as Lamps Plus asserts, an agreement like the one in this case is not properly viewed as ambiguous under California law, the California courts—and only the California courts—can make that clear.

3. Lamps Plus's contention that the panel's reliance on the state-law principle that ambiguity is to be construed against the drafter of a contract conflicts with this Court's precedents is also baseless. This Court has explicitly recognized that application of that principle is fully consistent with the FAA's requirement that arbitration agreements be enforced as written. In fact, this Court has used the principle itself to determine what parties assented to when they agreed to arbitrate. *See Mastrobuono*, 514 U.S. at 62–63. And nothing in *Stolt-Nielsen* or *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), suggests that the Court intended to rule out use of this canon of construction in determining whether the parties to an agreement intended to allow class arbitration. Those decisions reject reliance on state-law principles to "manufacture[]" class arbitration for

policy reasons, *Concepcion*, 553 U.S. at 348, but cast no doubt on the use of state-law rules aimed at determining what parties assented to when they agreed to ambiguous terms. Moreover, the forceful application of the principle of construction against the drafter of a contract of adhesion is consistent with *Concepcion*'s explicit recognition that "[s]tates remain free to take steps addressing the concerns that attend contracts of adhesion." 563 U.S. at 347 n.61.

Likewise, this Court's decision in *Imburgia* casts no doubt on the viability of state contract law requiring that ambiguous provisions be construed against the drafter. *Imburgia*'s statement about the "limits" of the canon referred only to the Court's holding that it could not be applied *in the absence of ambiguity*. 136 S. Ct. at 470. Nothing in *Imburgia* suggests that, if this Court had found that a state court applying state law even-handedly could have found the contract in that case ambiguous, the Court would have held that application of the construction-against-the-drafter principle was impermissible under the FAA.

Indeed, such a holding would have been anomalous because nothing about the principle of construing a contract against the drafter "discriminat[es]" against arbitration either "on its face" or "covertly." *Kindred*, 137 S. Ct. at 1426. There is no reason to believe that ambiguity is an inherent feature of arbitration agreements or that canons of construction applicable to ambiguous agreements have a "disproportionate impact" on arbitration clauses. *Concepcion*, 563 U.S. at 342. And the Court's own application of the principle to an arbitration agreement in *Mastrobuono* negates any suggestion that it is inconsistent with the FAA's "principal purpose of ensuring

that private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S. at 478.

C. This case does not implicate any conflict among the circuits.

Lamps Plus's claim of an intercircuit conflict rests on citation of a handful of cases that it claims interpreted contract language similar to the terms at issue here as not authorizing class arbitration. Even taken at face value, however, that contention would not demonstrate a conflict among the circuits on an important question of federal law. The assertedly conflicting decisions involve only whether particular contracts authorize class arbitration. That issue is one governed by state-law principles of contract construction, and the cases in question applied laws of different states. "Conflicting" constructions even of identical contract language under the laws of different states do not amount to a decisional conflict within the meaning of this Court's Rule 10(a), which reflects the principles governing this Court's exercise of its certiorari jurisdiction. Indeed, this Court cannot resolve such conflicts, as it has no power to issue authoritative rulings on state-law contract issues. *See Imburgia*, 136 S. Ct. at 468.

In any event, all of the supposedly conflicting decisions Lamps Plus invokes involved agreements with terms materially different from those of the contract at issue here. In *Reed Elsevier, Inc. ex rel. LexisNexis Division v. Crockett*, 734 F.3d 594 (6th Cir. 2013), the arbitration agreement concerned only claims that might arise out of a particular order for a commercial product, and it did not contain language comparable to that here concerning arbitration of all "civil legal proceedings" and "claims that would be

available to the parties" in them. Such language was likewise missing from the agreements in *Huffman v. Hilltop Cos., LLC*, 747 F.3d 391 (6th Cir. 2014), which involved a clause applicable only to claims arising from a particular agreement, and in *AlixPartners, LLP v. Brewington*, 836 F.3d 543 (6th Cir. 2016), which also was limited to claims arising out of a particular agreement and preserved the parties' *substantive* rights without, like the contract in this case, specifying its applicability to all "civil legal proceedings."

The Third Circuit's decision in *Opalinski v. Robert Half Int'l Inc.*, 677 F. App'x 738 (3d Cir. 2017), not only was unpublished and non-precedential, like the decision below, but also involved an agreement that lacked critical language relied on by the court in this case. Notably, the opinion in *Opalinski* did not contest that the contract construction issue before it was governed by New Jersey contract law and that the state's doctrine of construing ambiguities against the drafter could be applied if the contract were ambiguous. *See id.* at 742–43.

Equally unfounded is Lamps Plus's reliance on *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012). Not only the result, but also the reasoning of *Reed* was abrogated by this Court in *Oxford Health Plans*: *Reed* was based principally on the view that the absence of an express reference to class arbitration meant that the agreement could not be construed to authorize arbitration under *Stolt-Nielsen* because it was "silent" on the matter. *See* 681 F.3d at 642. This Court rejected that reading of *Stolt-Nielsen* in *Oxford Health Plans*, when it emphasized that the decision barred only class arbitration without a contractual basis, and did not require that the

contractual basis be express. *See* 569 U.S. at 571. The Fifth Circuit has not returned to the issue since *Reed*, but a recent and extensively reasoned district court opinion from that circuit has held, consistently with the decision below, that even language that does not refer specifically to class arbitration may suffice to delegate to an arbitrator the decision whether to allow arbitration on a classwide basis. *Langston v. Premier Directional Drilling, L.P.*, 203 F. Supp. 3d 777 (S.D. Tex. 2016).

Finally, Lamps Plus cites two decisions predating *Stolt-Nielsen*: *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001), and *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) Neither aids its cause. Those decisions, as Lamps Plus points out (Pet. 22) anticipated *Stolt-Nielsen*'s holding that a contractual basis for class arbitration is required, but say nothing about what constitutes a sufficient contractual basis in light of *Stolt-Nielsen*.

Importantly, none of the post-*Stolt-Nielsen* cases Lamps Plus cites holds that the FAA preempts the application of state contract-law principles to allow class arbitration under the terms of a contract materially identical to the contract here. In the absence of any such ruling, the contention that there is a circuit conflict over an issue of federal law is baseless. In the end, Lamps Plus's citations establish only that when an issue depends on the application of state-law contract principles to specific contractual language, different courts applying different states' laws to different contracts may reach different results. That truism provides no justification for review of the fact-specific state-law contract decision below.

II. The court of appeals' jurisdiction over this case was highly doubtful.

This Court's jurisdiction depends on whether a case was properly "in" the court of appeals. 28 U.S.C. § 1254; *see, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *United States v. Nixon*, 418 U.S. 683, 690 (1974). If this Court were to accept review, it would be required, in order to determine its own jurisdiction, to consider whether the court of appeals had jurisdiction over the appeal. Jurisdiction was not contested in the court of appeals and the panel did not discuss it, but there is significant reason to doubt the court's jurisdiction. The need to address a problematic jurisdictional issue before this Court could reach the question Lamps Plus seeks to present makes this case an exceptionally poor candidate for review.

The district court in this case compelled arbitration on the motion of Lamps Plus. The FAA permits appeals from *denials* of motions to order arbitration, *see* 9 U.S.C. § 16(a)(1)(B), but bars appeals from interlocutory orders directing arbitration to proceed. 9 U.S.C. § 16(b)(2). A court of appeals may not consider an appeal's merits in the face of such an express statutory denial of jurisdiction. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

The FAA is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). As the Fourth Circuit explained, "Congress sought to prevent parties from frustrating arbitration through lengthy preliminary appeals." *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991). Indeed, the Second Circuit has held that, in general, "a

party cannot appeal a district court's order unless, at the end of the day, the parties are forced to settle their dispute other than by arbitration." *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 99 (2d Cir. 1997). Appellate courts thus routinely refuse appeals from interlocutory orders favoring arbitration. *See, e.g., Preferred Care of Del., Inc. v. Estate of Hopkins*, 845 F.3d 765, 768 (6th Cir. 2017).

Attempting to skirt the FAA's limits on appellate jurisdiction, Lamps Plus characterizes the district court as having "denied the request for individual arbitration." Pet. 7. But the FAA's text is plain: "[A]n appeal may not be taken from an interlocutory order ... directing arbitration to proceed under section 4 of this title." 9 U.S.C. § 16(b)(2). Faced with district court orders compelling arbitration, "albeit not in the first-choice" manner for the party wishing to enforce the arbitration agreement, courts of appeals have uniformly concluded that they lack appellate jurisdiction to reach the merits. *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016); *see also Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 637–38 (7th Cir. 2011).

In *Al Rushaid*, the Fifth Circuit considered whether it had appellate jurisdiction over an order that compelled arbitration but denied the defendant's request that the arbitration take place before the International Chamber of Commerce. *Id.* at 303. Concluding that taking jurisdiction would frustrate § 16's purpose of promoting arbitration, the court held that it lacked jurisdiction. *Id.* at 304; *see also Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1154 (9th Cir. 2004) (holding the court lacked jurisdiction to hear an appeal of an order denying arbitration in front of one body in favor of arbitration before anoth-

er); *Augustea*, 126 F.3d at 98 (holding the court lacked jurisdiction to hear an appeal over an order to arbitrate in London instead of New York).

Similarly, in *Blue Cross*, the Seventh Circuit held that an order denying a motion seeking to direct arbitrators to "hold separate rather than consolidated proceedings" was not a refusal to "order arbitration to proceed" within the meaning of 9 U.S.C. § 16(a)(1)(B), 671 F.3d at 638, even though the moving party described its motion as a petition "to compel a de-consolidated arbitration," *id.* at 636. As Chief Judge Easterbrook explained, an order that *allows* arbitration to proceed, albeit not in the procedural manner preferred by a party, does not fall within the scope of §16(a)(1)(B) regardless of a party's "artful pleading": Calling such an order a refusal to direct arbitration to proceed "does not make it so." *Id.* at 638; *see also id.* ("Unlike Humpty Dumpty, ... a litigant cannot use words any way it pleases. ... Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one.").

The reasoning of the courts of appeals in these cases remains correct and is applicable here. If parties may appeal every pro-arbitration order that does not precisely comport with their wishes, the FAA's policy of "rapid and unobstructed enforcement of arbitration agreements" will be thwarted. *Moses H. Cone*, 460 U.S. at 22. Parties could engage in lengthy appellate litigation over the proper forum, the proper arbitrator, and the proper location of the arbitration under the agreement before the arbitration even began. *See Blue Cross*, 671 F.3d at 638.

Recognizing the weakness of reliance on § 16(a)(1)(B), Lamps Plus asserted in the jurisdictional statement in its brief below that appellate jurisdiction was also proper under 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(3) because the district court dismissed Mr. Varela's claims without prejudice. An order dismissing a plaintiff's claims in favor of arbitration was deemed final by this Court for purposes of appeal by the plaintiff in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 85–87 (2000). There, the dismissal was "with prejudice," and the Court deemed it final because it "disposed of the entire case on the merits" and left the court "nothing to do but execute the judgment." *Id.* at 86.

Here, by contrast, the dismissal was *without prejudice* and resolved nothing on the merits.[3] Importantly, moreover, the dismissal here was on Lamp Plus's motion and was not adverse to Lamps Plus. Lamps Plus's appeal did not even seek to set it aside. This Court has recently held that a party cannot manufacture finality of an otherwise unappealable interlocutory order by engineering the dismissal of a matter—even where, unlike here, the dismissal is with prejudice. *Microsoft*, 137 S. Ct. at 1712–15. Moreover, a party is generally not aggrieved by, and hence cannot appeal, an order granting relief it re-

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[3] The Ninth Circuit and other circuits have extended *Randolph* to allow appeals by plaintiffs whose claims have been dismissed without prejudice in favor of arbitration. *See, e.g., Interactive Flight Techs., Inc. v. Swissair Swiss Air Transport Co.*, 249 F.3d 1177 (9th Cir. 2001). Assuming their correctness, however, such decisions offer little support for an appeal by a *defendant* who procures dismissal without prejudice of the plaintiff's claims.

quested. *See id.* at 1717 (Thomas, J., concurring in the judgment). It would be nonsensical to allow a defendant to appeal an otherwise unappealable order just because it succeeded in convincing a district court to give it *more* relief than it needed by dismissing the plaintiff's claims without prejudice rather than staying them.

These principles strongly indicate that the Ninth Circuit lacked appellate jurisdiction. If the Court were to grant certiorari on the question Lamps Plus seeks to present, it would necessarily have to wrestle with this jurisdictional issue before reaching the merits—and to do so without the benefit of a decision below addressing the jurisdictional issue. By contrast, denial of certiorari avoids the need to consider the issue and leaves the parties in the same position they would be in if the court of appeals' decision were vacated for lack of jurisdiction: subject to a district court order directing arbitration to proceed.

III. A range of additional considerations make this case a poor choice for review.

1. Review is also unwarranted because the decision below was not final and did not conclude the dispute between the parties: It represents only an initial step in the litigation. This Court typically avoids taking up cases in an interlocutory posture. *See Va. Mil. Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). Although Mr. Varela's action has been dismissed without prejudice pending arbitration, that dismissal is hardly a final resolution of this controversy. Arbitration, and potentially one or more

rounds of judicial proceedings seeking to confirm or vacate an arbitration award, are likely to occur before this case reaches a truly final judgment.

In the course of those proceedings, any number of events could occur that would obviate any need to decide whether the arbitration agreement here permits class proceedings. The arbitrator might not certify a class, or might dispose of the case on the merits adversely to Mr. Varela's claims. Alternatively, if the case does proceed on a class basis, further review of the issue presented here would be possible either at the conclusion of the arbitration, on an application for judicial confirmation or vacatur of a final award, or potentially even through proceedings to confirm or vacate a "partial" award regarding class certification, as in *Stolt-Nielsen*. *See* 559 U.S. at 669–70. If review were otherwise appropriate, it would be better informed both by the arbitrator's own construction of the agreement and by the arbitrator's and lower courts' consideration of the appropriateness of class certification.

2. Review of the correctness of the court of appeals' reading of the arbitration agreement here would also be ill-advised because it is as yet unsettled by this Court whether that issue is properly a question for a court or an arbitrator. In both *Stolt-Nielsen* and *Oxford Health Plans*, the decision whether class arbitration was permissible under the arbitration agreements at issue had been made by arbitrators, and the Court applied the highly deferential standard of review applicable to arbitrators' decisions on matters properly submitted to them by the parties. *See Oxford Health Plans*, 569 U.S. at 568–72; *Stolt-Nielsen*, 559 U.S. at 671–72. The Court in *Oxford Health Plans*, however, noted that it was

an open question whether the issue of contractual authorization for class arbitration was a "gateway" issue properly subject to judicial determination or a question for the arbitrator, 559 U.S. at 569 n.2, and the Court has not yet decided that issue.

In this case, the lower court proceeded on the assumption that the issue is one for judicial determination. The parties did not brief the correctness of that view in the court of appeals, and the panel's opinion does not address it. It would be imprudent for this Court, however, to address the correctness of a court's decision on the availability of class arbitration without first addressing the antecedent question whether the issue is properly one for the court. A decision about *how* courts should decide whether contracts authorize arbitration would be wasted effort if the Court were ultimately to conclude that courts should not decide such issues in the first instance. This case, however, is not the appropriate choice for consideration of that antecedent question because neither the parties nor the courts addressed it below, and this Court does not generally decide issues not raised or decided below. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016).

3. In the Ninth Circuit, Mr. Varela's argument for affirmance rested in large part on an argument different from the one ultimately decided by the panel—namely, that the NLRA renders unenforceable employment agreements that have the effect of banning concerted legal actions by employees, including class actions. That question is currently pending before this Court in three consolidated cases, *Epic Systems Corp. v. Lewis*, No. 16-285, *Ernst & Young LLP v. Morris*, No. 16-300, and *NLRB v. Murphy Oil Co.*, No. 16-307, which were argued on October 2, 2017.

The Ninth Circuit's ruling on the contractual authorization issue made it unnecessary for it to reach the question presented by those cases. This Court may of course deny certiorari here on the contractual authorization question presented by Lamps Plus without any need to hold the petition for those decisions, but it cannot *reverse* the judgment that Mr. Varela may seek to represent a class unless it reverses in *Morris* and *Lewis* and affirms in *Murphy Oil*.

4. Finally, Lamps Plus's assertion that the issue here is so important that it requires review notwithstanding all the considerations discussed above is untenable. Whether class arbitration is contractually authorized by the terms of a particular arbitration agreement that does not expressly address class proceedings is a question of rapidly diminishing importance. In the wake of *Concepcion* and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), which hold that express provisions in arbitration agreements banning class actions are enforceable under the FAA, "[i]t has become routine ... for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses." *Imburgia*, 136 S. Ct. at 471 (Ginsburg, J., dissenting). The ubiquity of such provisions renders the question of how to interpret agreements that do not include them ever less significant as more time passes and express class action bans proliferate.

Meanwhile, appellate decisions addressing whether class arbitration is available under clauses that do not expressly address class proceedings have been relatively few in number since *Stolt-Nielsen*, as the small number of allegedly conflicting cases cited by Lamps Plus illustrates. Cases in which courts

have construed arbitration agreements to permit class arbitration are rarer still. The suggestion that a single, non-precedential decision addressing the distinctive language of one arbitration agreement is likely to open the floodgates to class arbitration in cases where, unlike this one, it lacks the required contractual basis under *Stolt-Nielsen* is utterly implausible.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 17-988

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS[1]

The brief in opposition offers no persuasive defense of the decision below. As the petition explains, the Ninth Circuit panel's identification of an agreement to authorize class arbitration based on language found in virtually any standard arbitration clause amounts to a "palpable evasion of *Stolt-Nielsen S.A.* v. *Animal Feeds Int'l Corp.*, 559 U.S. 662, 684-85 (2008)." Pet. App. 5a (Fernandez, J., dissenting); see also Pet. 9-19; Chamber of Commerce Br. 4-10.

That error is so clear as to warrant summary reversal. Pet. 27; Chamber of Commerce Br. 10-12. And by departing from this Court's clear guidance, the decision below creates a circuit conflict that independently warrants review to secure uniform application of the FAA. Pet. 19-22.

Desperate to avoid scrutiny by this Court of the Ninth Circuit's "palpable evasion" of the FAA, Varela uses the smokescreen approach—advancing a potpourri of purported obstacles to review. Each is unpersuasive.

First, Varela contends that the Ninth Circuit lacked jurisdiction. That argument contradicts this Court's holding that a district court's dismissal of the underlying claims in favor of arbitration is a "'final decision with respect to an arbitration'" subject to "immediate appeal" under Section 16(a)(3) of the FAA. *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 86-87 (2000) (quoting 9 U.S.C. § 16(a)(3)).

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[1] The Petition's Rule 29.6 Statement remains accurate.

Next, Varela insists that the decision below reflects generally applicable state contract-law principles. But this Court rejected similar arguments in *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421 (2017), and *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015). Here too, this Court's intervention is needed to address lower court defiance of the FAA under the guise of state contract law.

Finally, Varela's grab-bag of other purported barriers to review fares no better. For example, Varela's speculation that the question presented is of "rapidly diminishing importance" (Opp. 27) as parties expressly prohibit class arbitration in their agreements ignores the numerous recent cases involving the question presented here (Pet. 19-23 & n.8).

The conflict between the decision below and this Court's FAA precedents (as well as decisions of other circuits) is clear, and Varela has not identified any sound reason why this Court should decline review.

I. The Court Below Had Jurisdiction.

Varela is simply wrong in asserting that there is a "problematic jurisdictional issue" here. Opp. 20-24. He argues for the first time that the district court's order compelling class-wide arbitration is a non-appealable order "directing arbitration to proceed." *Id.* at 20-22 (citing 9 U.S.C. § 16(b)(2)).

But that argument is a red herring. As Varela acknowledges (Opp. 23), the district court's order *also dismissed* his claims. Pet. App. 23a. That dismissal rendered the order final. As this Court held in *Randolph*, when a district court orders arbitration and dismisses the plaintiff's claims, the order is "'a

final decision with respect to an arbitration' within the meaning of § 16(a)(3), and an appeal may be taken." 531 U.S. at 86-87 (quoting 9 U.S.C. § 16(a)(3)).

Varela tries and fails to distinguish *Randolph* in two ways. He first notes that the dismissal here was "without prejudice," while the dismissal in *Randolph* was "with prejudice." Opp. 23. But he fails to explain how that could possibly make a difference. The dismissal here had the exact same effect as the dismissal with prejudice in *Randolph*: it "disposed of the entire case on the merits" and "left no part of it pending before the court." 531 U.S. at 86. This kind of dismissal is without prejudice "only in th[e] sense" that it does not "preclud[e] the parties from bringing a new action after completing arbitration," which "is not enough to show that the dismissal was interlocutory rather than an appealable final decision" under Section 16(a)(3). *Interactive Flight Techs., Inc.* v. *Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001) (citing *Randolph*).[2]

Second, Varela argues that the district court's dismissal "was not adverse to Lamps Plus." Opp. 23. But the court's order also compelled a *class-wide* ar-

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[2] *Every* other circuit to reach the issue has similarly held that a dismissal without prejudice in favor of arbitration is a final, appealable order. See *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005); *Westlake Styrene Corp.* v. *P.M.I. Trading Ltd.*, 71 F. App'x 442, 442 (5th Cir. 2003); *Blair* v. *Scott Specialty Gases*, 283 F.3d 595, 601-02 (3d Cir. 2002); *Salim Oleochemicals* v. *M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002), abrogated on other grounds by *Katz* v. *Cellco P'Ship*, 794 F.3d 341 (2d Cir. 2015).

bitration that Lamps Plus never sought—and actively argued *against*. See Pet. 7.[3]

Even if there had been no dismissal, Lamps Plus was entitled to appeal because the district court's order effectively *denied* Lamps Plus's motion to compel arbitration. Lamps Plus asked for "an order directing that * * * arbitration proceed *in the manner provided for in such agreement*"—i.e., on an individual basis. 9 U.S.C. § 4 (emphasis added); ER 144. That the district court purported to grant Lamps Plus's motion is not controlling: in matters of appellate jurisdiction, this Court is "concerned, not with form, but with substance." *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 259 (1933).

Varela contends that Lamps Plus received an "order granting relief it requested," and "succeeded in convincing a district court to give it *more* relief than it needed" (Opp. 23-24), and complained only because the arbitration ordered was "not in the procedural manner preferred by" Lamps Plus (*id.* at 22). But this Court in *Stolt-Nielsen rejected* the proposition that class-wide arbitration involves "merely what 'procedural mode' is available to present [a party's] claims." 559 U.S. at 687. It held that "class arbitration" is "not arbitration as envisioned by the FAA" and "lacks its benefits." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350-51 (2011). And "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'funda-

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[3] Varela never asked the district court for an order compelling class arbitration. Rather, recognizing that Lamps Plus's motion sought to compel arbitration on an individual basis, Varela asked the district court to *deny* the motion. *E.g.*, ER 111-112, 122, 135.

mental.'" *Id.* at 348 (quoting *Stolt-Nielsen*, 559 U.S. at 686).[4] The district court's order in this case imposed these "fundamental" changes on Lamps Plus over its objections; Lamps Plus was entitled to appeal that adverse decision.

II. The Decision Below Defies This Court's Precedents Interpreting The FAA.

1. Varela offers only a cursory defense of the merits of the decision below. He first insists that no federal question is presented here because the panel purported to discover an intent to authorize class-wide arbitration based on California contract law. Opp. 7-11.

That argument ignores *Stolt-Nielsen*, which explained that "[w]hile the interpretation of an arbitration agreement is *generally* a matter of state law, the *FAA* imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" 559 U.S. at 681 (citations omitted; emphasis added). Accordingly, the

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[4] Not one of the cases Varela cites (Opp. 21-22) involved an order imposing class arbitration on a defendant over its objection; most involved different locations or forums for an individual arbitration. *Al Rushaid* v. *Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016) (no jurisdiction over order compelling arbitration within the Southern District of Texas rather than before the International Chamber of Commerce); *Blue Cross Blue Shield of Mass., Inc.* v. *BCS Ins. Co.*, 671 F.3d 635, 637-38 (7th Cir. 2011) (order refusing to deconsolidate a pending arbitration); *Bushley* v. *Credit Suisse First Boston*, 360 F.3d 1149, 1154 (9th Cir. 2004) (order compelling arbitration under company dispute resolution program rather than before the National Association of Securities Dealers); *Augustea Impb Et Salvataggi* v. *Mitsubishi Corp.*, 126 F.3d 95, 98 (2d Cir. 1997) (order compelling arbitration in New York rather than London).

"*FAA* requires more" (*id.* at 687 (emphasis added)) to infer an agreement to authorize class arbitration beyond "the fact of the parties' agreement to arbitrate" (*id.* at 685) incorporating language found in most any arbitration agreement.

Varela concedes that the FAA displaces an interpretation of state law that "impose[s] class arbitration for policy reasons rather than on the basis of contract-law principles that 'give effect to the contractual rights and expectations of the parties.'" Opp. 8 (quoting *Stolt-Nielsen*, 559 U.S. at 682). That is exactly what the panel below did here. See Pet. 13-19.

Moreover, this Court granted review in both *Kindred* and *Imburgia* over similar contentions that the lower court rulings rested on state-law grounds. See Br. in Opp. 14-18, 34, *Kindred* (No. 16-32), 2016 WL 4710183; Br. in Opp. 3, *Imburgia* (No. 14-462), 2015 WL 455815. *Imburgia* squarely rejected the state court's protestations of neutrality in interpreting the phrase "law of your state" in a consumer contract. This Court held that although "California courts are the ultimate authority on [California] law," it was for this Court to decide whether "that state law is consistent with the Federal Arbitration Act." *Imburgia*, 136 S. Ct. at 468.

2. Varela's half-hearted defense of the Ninth Circuit's interpretation of the Agreement underscores the lower court's error.

The petition explains (at 13-19) why the panel majority (Judges Reinhardt and Wardlaw) erred in declaring that there was "ambiguity" as to whether the parties agreed to class arbitration based on the following language:

- the waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";
- the waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- the agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

Pet. App. 3a. Varela appears to give up on the first two phrases, acknowledging that "waiver of a right to a jury" and of the right to go to court are "inherent in all arbitration agreements." Opp. 12; see also *Kindred*, 137 S. Ct. at 1427 (describing "a waiver of the right to go to court and receive a jury trial" as "the primary characteristic of an arbitration agreement"). Varela also has no response to our showing that class procedures are not a substantive "claim" or a "remedy," and thus an agreement to use class procedures cannot be inferred from the Agreement's authorization of arbitration for "claims" that "would have been available to the parties by law" or for the arbitrator to award "any remedy allowed by applicable law." Pet. 15-16.

As to the Agreement's statement that arbitration is "in lieu" of "civil legal proceedings," Varela accuses us of confusing the word "proceedings" with "procedures." Opp. 12 & n.2. But he is describing the Ninth Circuit's error, not ours. The "in lieu of" language simply means that arbitration replaces litigation in court (Pet. 14 & n.4); it was the Ninth Circuit that read the phrase to mean that the arbitration must

duplicate all procedures available in court, such as the class device.[5]

Varela argues that the Ninth Circuit could have inferred ambiguity about whether the parties agreed to class arbitration from the Agreement's "unique *combination* of provisions." Opp. 12. But not one of the provisions in the Agreement even remotely supports an inference that the parties agreed to authorize class arbitration. Zero plus zero equals zero, not one. And Varela ignores multiple provisions of the Agreement demonstrating the parties' intent to engage in traditional, bilateral arbitration. Pet. 14-16 & nn.5-6.

Finally, Varela's reliance on *Oxford Health Plans* (Opp. 13-14) is misguided: the arbitrator's construction of the contract stood *only* because of the limited judicial review available under Section 10 of the FAA. See Pet. 28.

For all of these reasons, Varela's attempt to defend the panel majority's resort to the state-law principle that ambiguities are construed against the drafter (Opp. 15-17) never gets off the ground: "the Agreement was not ambiguous." Pet. App. 5a (Fernandez, J., dissenting). And Varela's suggestion that Lamps Plus's disagreement with the majority's interpretation of the Agreement *itself* creates an ambiguity (Opp. 12) contradicts clear California law: "An agreement is not ambiguous merely because the parties (or judges) disagree about its meaning." *Abers* v.

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[5] Varela also points to the Agreement's provisions addressing discovery and other procedural matters (Opp. 12 n.2), but fails to address our showing that the Agreement's limits on discovery (such as one deposition per side) further demonstrates that the parties contemplated *bilateral* arbitration. Pet. 15 n.5.

Rounsavell, 189 Cal.App.4th 348, 356 (2010); accord *Pac. Gas & Elec. Co.* v. *FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984).

In any event, the FAA forecloses the panel majority's reliance on a state-law canon to manufacture consent to class arbitration. Pet. 18-19. Varela points to this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (cited at Opp. 15-16), but *Mastrobuono* did not hold, or even suggest, that the *Federal* Arbitration Act takes a backseat to any *state*-law maxim. *Mastrobuono* decided the question presented—whether the contract at issue authorized arbitration of punitive-damages claims—by applying the strong federal policy *favoring* arbitration. The Court first drew the pro-arbitration conclusion that punitive-damages claims are arbitrable absent a clear statement of the parties' contrary intent, which the parties had not made. 514 U.S. at 57-62. The Court then explained that (in the context of that case) construing the language of the arbitration provision against the drafter lent *further support* to the conclusion that the dispute was subject to arbitration. *Id.* at 62-63. Thus, the Court did not hint that a state-law tenet could trump the FAA when the two point in *opposite* directions.

III. The Decision Below Conflicts With The Decisions Of Several Other Circuits.

Varela fares no better in attempting to paper over the conflict between the decision below and decisions from other courts. Opp. 17-19.

He argues that each involved "terms materially different from those of the contract at issue here" (Opp. 17), but identifies no differences that are actually material. He relies heavily on this Agreement's

statement that arbitration shall be in lieu of "civil legal proceedings" (*id.* at 17-18), but as explained above, that statement does not hint at an agreement to authorize class arbitration.

Varela also asserts that the Fifth Circuit's "reasoning" in *Reed* v. *Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012) was abrogated by *Oxford Health Plans*. Opp. 18-19. But as the petition explains, while the Fifth Circuit was not permitted to override an *arbitrator's* interpretation of the contract under Section 10 of the FAA, the Fifth Circuit's explanation of the flaws in the arbitrator's interpretation continues to have persuasive force in the context of a *de novo* review of a *court's* contract interpretation. Pet. 21-22 & n.7.

Finally, Varela mischaracterizes the square conflict presented here as merely reflecting the application of different states' contract laws. Opp. 19. It is "the *FAA*"—not state law—that "requires more" to infer an agreement to authorize class procedures than "the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687 (emphasis added); see also pages 5-6, *supra*. The Ninth Circuit's defiance of that federal principle creates a conflict with other courts of appeals on the question of FAA preemption presented by the petition.

IV. Varela's Other Asserted Obstacles To Review Are Baseless.

Varela raises a handful of other arguments, but none undermines the need for or appropriateness of this Court's review.

First, Varela repeatedly notes that the decision below is unpublished. Opp. 1, 6, 18. But the panel majority should not be able to insulate its "palpable

evasion" of this Court's precedents (Pet. App. 5a) by passing it off as a routine application of settled precedent—especially over a strong dissent. "Nonpublication must not be a convenient means to prevent review." *Smith* v. *United States*, 112 S. Ct. 667 (1991) (Blackmun, J., dissenting from denial of certiorari); see also *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari); Chamber of Commerce Br. 12 n.3.

Second, Varela notes that the decision below does not resolve the merits of the underlying dispute. Opp. 24-25. But that decision is the final word on the question presented—whether the Agreement authorizes class arbitration. This Court routinely decides cases involving the FAA before the resolution of the parties' underlying dispute. See, *e.g.*, *Kindred*, 137 S. Ct. 1421; *Imburgia*, 136 S. Ct. 463; *Am. Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013); *Concepcion*, 563 U.S. 333.

Third, Varela states that it is an open question whether the availability of class arbitration "is properly a question for a court or an arbitrator." Opp. 25-26. But the parties agreed to have a court decide that issue, so that question is irrelevant here.

Fourth, Varela points to the consolidated cases pending before this Court involving class-action waivers in the employment context, and argues that reversal here is contingent on the outcome of those cases. Opp. 26-27. But that was not the basis for the Ninth Circuit's decision. In any event, those cases will be decided this Term, perhaps before consideration of the petition. Holding this petition until those cases are resolved presents no difficulty.

Finally, Varela speculates, without empirical support, that the question presented is becoming less important since this Court's decisions in *Concepcion* and *American Express*. But at least a dozen circuit and district court cases decided since *American Express* and *Concepcion* present the issue whether an arbitration agreement authorizes class arbitration under *Stolt-Nielsen*. Pet. 19-23 & n.8. In addition, the American Arbitration Association's class arbitration docket reveals over 40 Clause Construction Awards—i.e., decisions by arbitrators assessing whether an arbitration clause authorizes class arbitration—since 2013. The issue presented has not vanished. Instead, the Ninth Circuit's defiance of this Court's precedents warrants this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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IN THE

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Petitioners,

v.

FRANK VARELA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Perry v. Thomas,
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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amicus curiae*'s intent to file and consented to the filing of this brief.

less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

Amicus thus has a strong interest in the faithful and consistent application of this Court's FAA jurisprudence and, in particular, the FAA's "two goals"—"enforcement of private agreements and encouragement of efficient and speedy dispute resolution." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the fundamental precepts of the FAA is that "arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *see also Volt*, 489 U.S. at 478-79 (underscoring the congressional goal of "ensuring that private arbitration agreements are enforced according to their terms"). Consistent with that baseline precept, this Court held in *Stolt-Nielsen* that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U.S. at 684. Courts and arbitrators thus may not infer "[a]n implicit agreement to authorize class-action arbitration ... solely from the fact of the parties' agreement to arbitrate." *Id.* at 685.

But that is precisely what the Ninth Circuit panel majority (Reinhardt & Wardlaw, JJ.) did in this case. The majority held that class arbitration was required, notwithstanding the fact that there was no contractual basis for doing so. To be sure, the panel purported to rely on language within the arbitration agreement. But that contract language did nothing more than replace litigation with arbitration as the parties' agreed-upon mechanism for dispute resolution by waiving the right to go to court and resolve disputes via trial. That is, the relevant contract language did precisely what any garden-variety arbitration agreement does: it waived "the right to go to court and receive a jury trial." *Kindred Nursing Ctrs. v. Clark*, 137 S. Ct. 1421, 1427 (2017).

Judge Fernandez (in dissent) described the panel's decision as a "palpable evasion of *Stolt-Nielsen*." Pet. App. 5a. This is an apt description. But the decision is even worse than that. By forcing class procedures on the parties, the panel robbed the parties of the advantages of arbitration as envisioned by the FAA, thereby running afoul of the "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Summary reversal is warranted here. *See, e.g.*, *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530 (2012) (per curiam); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (per curiam). The decision below is clearly erroneous; the panel's evasion of *Stolt-Nielsen* is precisely the type of hostility toward arbitration the FAA was meant to eradicate; the decision threatens to undermine the enforcement of arbitration agreements throughout the

Ninth Circuit; and, if left uncorrected, the decision may green-light other circuits to engage in similar hostility against the FAA.

ARGUMENT

I. The Decision Below Patently Violates The FAA.

In 1925, Congress responded to "centuries of judicial hostility to arbitration agreements," by enacting the FAA. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). The FAA codified a "national policy favoring arbitration" and "place[d] arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 232 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

Section 2 is the FAA's centerpiece. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It makes written arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2; *see also Perry v. Thomas*, 482 U.S. 483, 489 (1987). Section 2 "create[s] a body of federal substantive law of arbitrability," *id.*, a "principal purpose" of which is to "ensur[e] that private

arbitration agreements are enforced according to their terms," *Volt*, 489 U.S. at 478-79.

Consistent with this purpose and the consensual nature of arbitration, parties "are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (quotation omitted). And courts and arbitrators must "give effect to the[ir] contractual rights and expectations," *Volt*, 489 U.S. at 479. Accordingly, parties may (and often do) agree on the issues they choose to arbitrate, the forum in which the arbitration will take place, the rules under which arbitration will proceed, and who will resolve specific issues. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Volt*, 489 U.S. at 479; *Stolt-Nielsen*, 559 U.S. at 683.

As the Court explained in *Stolt-Nielsen*, parties also "may specify *with whom* they choose to arbitrate their disputes." 559 U.S. at 683. Because courts and arbitrators must "give effect to the intent of the parties ... it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for [doing so]." *Id.* at 684. And because the shift from bilateral to class arbitration interferes with the fundamental attributes of arbitration as envisioned by the FAA, the Court explained, "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." *Id.* at 685. To so presume would violate the FAA's purpose of ensuring that arbitration agreements are enforced "according to their terms." *Volt*, 489 U.S. at 478-479.

Moreover, requiring class procedures in arbitration where they are not consensual would violate the FAA's other primary purpose—"encourag[ing] efficient and speedy dispute resolution." *Dean Witter Reynolds*, 470 U.S. at 221. Consistent with the "national policy favoring arbitration," *Buckeye Check Cashing*, 546 U.S. at 443, the FAA was meant to promote "streamlined proceedings and expeditious results," *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) (quotation omitted). But imposing class procedures on arbitration would replace the advantages inherent in bilateral arbitration—informality, inexpensiveness, efficiency—with "procedural formalit[ies]" that "make[] the process slower [and] more costly." *Concepcion*, 563 U.S. at 348-49. In short, this would "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Id.* at 344. That is why "express contract provisions permitting arbitration on a class basis are rare." Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103, 1160 (2011); *see also* Larry R. Leiby, *Class Arbitrations Under Attack—But Survive*, 7 No. 1 Journal of the American College of Construction Lawyers 4 (Jan. 2013) ("An arbitration agreement or clause that expressly provides for class arbitration would be rare. The author has never seen one.").

As explained more fully below, the panel held that the parties must proceed to class arbitration based solely on routine contractual language of the kind found in any arbitration agreement—that is, without "a contractual basis for concluding that the part[ies] *agreed* to [class procedures]." *Stolt-Nielsen*, 559 U.S. at 684. "The panel's conclusion [thus] is fundamentally at war with the foundational FAA principle that arbitration is a matter of

consent." *Id.* at 684. On top of that, the panel's decision is inconsistent with the national policy in favor of arbitration. *Concepcion*, 563 U.S. at 339.

A. The Decision Below Is A "Palpable Evasion" Of *Stolt-Nielsen*.

As noted above, *Stolt-Nielsen* makes clear that courts and arbitrators may not infer "[a]n implicit agreement to authorize class-action arbitration ... solely from the fact of the parties' agreement to arbitrate." 559 U.S. at 685. "[T]he FAA requires more." *Id.* at 687. The Court left open in *Stolt-Nielsen* how much more is required. *Id.* at 687 n.10. But as Petitioners put it, the panel majority "resolv[ed] the question left open in *Stolt-Nielsen* in a manner fundamentally incompatible with *Stolt-Nielsen* itself." Pet. 13.

The panel relied on three provisions of the arbitration agreement in holding that the parties must proceed to class arbitration. Specifically, the panel relied on Respondent's waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company" and "any right I may have to resolve employment disputes through trial by judge or jury," as well as his agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." Pet. App. 3a.

But these provisions do nothing more than replace litigation with arbitration as the parties' mechanism for dispute resolution—by waiver of the right to go to court and resolve disputes via a jury (or bench) trial. Every arbitration agreement does at least this; indeed, "a waiver

of the right to go to court and receive a jury trial" is "the primary characteristic of an arbitration agreement." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427. Petitioners thus are correct to point out that, if these routine provisions "were enough, then *any* arbitration agreement that does not expressly waive class procedures could support an inference that the parties agreed to class arbitration." Pet. 13.[2] That is, the opinion in practice creates a default rule that ordinary arbitration agreements result in class arbitration unless the parties expressly disclaim this result. The Ninth Circuit has thus inverted the holding of *Stolt-Nielsen*.

Judge Fernandez was accordingly correct to describe the panel majority's decision as a "palpable evasion of *Stolt-Nielsen*." Pet. App. 5a. Indeed, the panel's (mis)application of *Stolt-Nielsen* would reduce that important precedent to a practical nullity. Pet. 13. *Stolt-Nielsen* would have no effect—except for in the rare case where parties stipulate that contractual silence on the issue of class arbitration means "there's been no agreement that has been reached on that issue." 559 U.S. at 668-69 (quotation omitted); *see* Pet. App. 2a.

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2. As Petitioners explain, the canon construing ambiguous contract language against the drafter has no effect here. *See* Pet. 18-19. "[T]he reach of [that canon] must have limits, no matter who the drafter was." *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 470 (2015). The key limit here, of course, is that the relevant contract language must be ambiguous. But the provisions relied upon by the panel are "not ambiguous." Pet. App. 5a (Fernandez, J, dissenting). Given a proper reading, the agreement "demonstrat[es] the parties' intent to engage in traditional, bilateral arbitration." Pet. 14.

B. The Panel Decision Also Runs Afoul Of The Liberal Federal Policy Favoring Arbitration.

As explained above, the panel violated *Stolt-Nielsen*'s rule that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U.S. at 684. By requiring class arbitration where it is not consensual, the panel also ran afoul of the "liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339 (quotation omitted).

As the Court has emphasized, "[its] cases place it beyond dispute that the FAA was designed to promote arbitration." *Id.* at 345. To the point, the Court has repeatedly remarked that the "prime objective" of arbitration to "achieve streamlined proceedings and expeditious results," *Preston*, 552 U.S. at 357-58 (quotation omitted), and that this is why parties choose arbitration as a means of resolving their disputes, *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *see also Mitsubishi Motors*, 473 U.S. at 633 ("[I]t is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.").

As the Court explained in *Concepcion*, requiring classwide arbitration where it is not consensual interferes with the fundamental attributes of arbitration and undermines its prime objectives. "[S]witch[ing] from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality." 563 U.S. at 348.

Indeed, "class arbitration *requires* procedural formality." *Id.* at 349. It thus makes dispute resolution "slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. By shifting to class arbitration, then, "the expedition, informality, and cost-savings of traditional bilateral arbitration are lost." Pet. 25.

At the same time, shifting to class arbitration "greatly increases risks to defendants," *Concepcion*, 563 U.S. at 350—because of the sharply limited judicial review inherent in arbitration. As the Court has noted, "[t]he absence of multilayered review makes it more likely that errors will go uncorrected." *Id.* Parties are willing to accept these errors when "their impact is limited to the size of individual disputes" and "outweighed by savings from avoiding the courts." *Id.* But when faced with the prospect of damages aggregated among thousands of claimants, the risk of error becomes to great to bear. *Id.* ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

Class arbitration thus negates the chief advantages of arbitration and magnifies its disadvantages. It is "not arbitration as envisioned by the FAA." *Id.* at 351. Rather, it "is a worst-of-both worlds hybrid of arbitration and litigation." Pet. 25. Accordingly, the imposition of class procedures (where it is nonconsensual) flouts the FAA and its federal policy in favor of arbitration.

II. Summary Reversal Is Warranted.

"No one denies that lower courts must follow this Court's holding[s]." *DirecTV, Inc. v. Imburgia*, 136 S.

Ct. 463, 468 (2015). Thus is true in FAA cases, just the same as in all other areas of the law. *See id.* Accordingly, when lower courts fail to apply this Court's decisions interpreting the FAA, the Court has not hesitated to intervene. *See Kindred Nursing Ctrs.*, 137 S. Ct. at 1427-28; *Imburgia*, 136 S. Ct. at 468-71. In fact, the Court has summarily reversed "several times in recent years to set aside manifest failures by lower courts to adhere to this Court's arbitration rulings." Pet. 27. *See Nitro-Lift*, 568 U.S. 17; *Marmet Health*, 565 U.S. 530; *Cocchi*, 565 U.S. 18; *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam).

Summary reversal is undoubtedly "strong medicine." *Dudley v. Stubbs*, 489 U.S. 1034, 1039 (1989) (O'Connor, J., dissenting). But this is one of those cases in which that medicine is needed. The relevant law "is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Eugene Gressman et al., Supreme Court Practice 350 (9th ed. 2007) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *see also id.* at 352 ("[T]he Court has shown no reluctance to reverse summarily a ... decision found to be clearly erroneous."). And this is not the first time the Ninth Circuit has failed to properly apply the FAA and this Court's precedents interpreting it. *See, e.g., Concepcion*, 563 U.S. 333; *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

Summary reversal is especially warranted given the judicial hostility to arbitration exhibited by the court below. Pet. 27 ("It is hard to imagine a result more inimical to the strong federal policy favoring arbitration embodied by the FAA."). As Judge Fernandez aptly put it, the Ninth Circuit's decision is a "palpable evasion of *Stolt-Nielsen*,"

App. 5a (Fernandez, J., dissenting). Indeed, the panel "underruled" *Stolt-Nielsen*, rendering it a nullity within the Ninth Circuit. *See supra* p. 8. Lower courts, of course, are not permitted to nullify this Court's precedents. Although they are "free to note their disagreement with a decision of this Court," *Imburgia*, 136 S. Ct. at 468, they nonetheless must follow it. Only "'this Court [has] the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

If left uncorrected, the panel decision would undermine the enforcement of arbitration agreements throughout the Ninth Circuit. Defendants across the nine States within the circuit who have entered into "garden-variety arbitration agreements like the one in this case ... will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment." Pet. 26-27.

Worse still, decisions like the one below, if left unchecked, allow judicial hostility to arbitration to persist elsewhere and may green-light other circuits to engage in similar hostility against the FAA. This would upset the uniform, faithful application of the FAA that is critical to *amicus* and its members.[3]

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3. An additional factor weighing in favor of summary reversal is the panel's issuance of its decision as an unpublished memorandum disposition. Pet. App. 1a. Given the presence of a dissent—particularly one that deemed the panel decision contrary to this Court's precedent—the decision was clearly a contestable one and cannot fairly be passed off as a routine application of settled precedent. This Court should not allow an "unpublished"

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for certiorari and summarily reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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February 12, 2018

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designation to insulate such contestable and important holdings from further review.

No. 17-988

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JAN. 10, 2018
CERTIORARI GRANTED APRIL 30, 2018

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The following items are not reproduced in the joint appendix because they have already been reproduced in the petition for a writ of certiorari, at the pages indicated:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK VARELA, on behalf of himself and all others similarly situated,

Plaintiff,

v.

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Defendants.

No. 5:16-cv-577-DMG-KS

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	3/29/2016	Complaint
34	5/31/2016	Defendants' Motion to Compel Arbitration or to Dismiss
37	6/10/2016	Plaintiff's Opposition to Defendants' Motion to Compel Arbitration or to Dismiss
38	6/17/2016	Defendants' Reply in Support of Motion to Compel Arbitration or to Dismiss
40	7/7/2016	Minutes of In Chambers Order on Motion to Compel Arbitration or to Dismiss

NO.	DATE	DESCRIPTION
41	7/29/2016	Defendants' Notice of Appeal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK VARELA, on behalf of himself and all others similarly situated,

Plaintiff-Appellee,

v.

LAMPS PLUS, INC.; LAMPS PLUS CENTENNIAL, INC.; LAMPS PLUS HOLDINGS, INC.; DOES, 1 through 10, inclusive,

Defendants-Appellants.

No. 16-56085

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
17	3/10/2017	Appellants' Opening Brief
18	3/10/2017	Excerpts of Record
24	4/10/2017	Appellee's Answering Brief
27	4/24/2017	Appellants' Reply Brief
37	8/3/2017	Opinion
40	9/11/2017	Order Denying Rehearing

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
EASTERN DIVISION

FRANK VARELA, on behalf of
himself and all other similarly situated,
Plaintiff,
v.
LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC., and DOES 1 through 10, inclusive,
Defendants.

Case No: 5:16-cv-00577
Hon. Dolly M. Gee
Complaint Filed: March 29, 2016

DECLARATION OF MICHELE M. VERCOSKI IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION ON AN INDIVIDUAL BASIS, IN THE ALTERNATIVE, A RULE 12(B)(6) MOTION TO DISMISS

Filed concurrently with Plaintiff's Opposition;
Declaration of Frank Varela

DECLARATION OF MICHELE M. VERCOSKI

I, Michele M. Vercoski, hereby declare as follows:

1. I am an attorney licensed to practice law before all courts of the State of California in the above-captioned action. I am a partner at the law firm McCuneWright, LLP, one of the counsels of record for Plaintiff Frank Varela. The following facts are

within my personal knowledge or based on records and files at my law firm, and, if called upon as a witness, I could and would testify competently thereto.

2. Attached hereto as Exhibit 1, is a true and correct copy of the JAMS Employment Arbitration Rules & Procedures, which I downloaded from JAMS' website on June 9, 2016 from http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2014.pdf.

3. In its motion, Lamps Plus submits that this Court should order that a JAMS arbitrator be used to arbitrate Plaintiff's claims. In doing so, Lamps Plus draws the Court's attention to Attachment A, which provides that "arbitration will be conducted by the Judicial Arbitration & Mediation Service, Inc. ('J.A.M.S.')." Beeson Decl., ¶ 7, Ex. 1. However, they acknowledged that the arbitration provision allows for the party initiating arbitration can demand arbitration with either JAMS or AAA. As such, Lamps Plus deems itself the part initiating arbitration and as such, elect to use JAMS in the potential arbitration of Plaintiff's claims.

4. In both its motion and the arbitration provision, Lamps Plus claims that it would "pay all fees associated with the arbitration that are unique to arbitration including the costs of the arbitrator." Mot., 6:26-7:1; Beeson Decl., ¶ 7, Ex. 1. However, the Lamps Plus Employment Arbitration Rules and Procedures provide that "the arbitration shall be in accordance with the then-current J.A.M.S. Employment Arbitration Rules." Beeson Decl., Ex. 1, ¶ 2. Yet, the current J.A.M.S. Employment Arbitration Rules provide that if an arbitration is based on an agreement "that is required as a condition of employment, the only fee that an employee may be re-

quired to pay is the initial JAMS Case Management Fee." Ex. 1 JAMS Employment Arbitration Rules & Procedures, Rule 31(c). Rule 31(c) goes on to state, "JAMS does not preclude an employee from contributing to administrative and Arbitrator fees and expenses." *Id.* In fact, in the section titled "Administrative Fees," the JAMS rules provide that for employment matters involving three or more parties, such as this case, the Filing Fee is $2,000. A Case Management Fee of 12% will be assessed against all Professional Fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation." *Id.* As such, there exists a conflict between the arbitration provision, the Lamps Plus Employment Arbitration Rules and Procedures and Lamps Plus motion as to the fees and expenses Plaintiff could be required to pay. Indeed, given this conflict, it is quite possible that Lamps Plus could argue in arbitration that such fees and expenses be allocated to Plaintiff.

5. Moreover, the nature of this case involves highly technical facts pertaining to firewalls and storage of employee data. As such, due to the complexity of the facts in this case involving cyber security, it is necessary that Plaintiff get access to Lamps Plus's computer system, and have an expert work with attorneys to establish how the unknown criminal was able to co-opt Lamps Plus's email system so as to pose as an employee. The cost of such an expert could alone costs thousands of dollars, of which Plaintiff would be unable to afford on his own.

6. Additionally, Plaintiff's right to discovery under the Lamps Plus Employment Arbitration Rules and Procedures is extremely limited. These rules provide that each party has the right to depose one

witness as well as any expert designated by the parties. Beeson Decl., Ex. 1. However, Plaintiff is likely to require testimony from multiple witnesses within Lamps Plus's corporate structure, including, personnel from its information technology and human resources departments. Further, these rules preclude Plaintiff from utilizing other powerful discovery tools, such as interrogatories, requests for admission and inspections. If Plaintiff is required to arbitrate his claims, he would be prohibited from inspecting Lamps Plus's computer system. Additionally, any and all documents pertinent to Plaintiff's claims are sensitive and exclusively in Lamps Plus's control and without proper judicial oversight could easily be concealed from Plaintiff. Thus, given the limited extent of discovery permitted by these rules, Plaintiff would be severely limited in the information he would have available to him in arbitrating his claims.

7. Furthermore, while Plaintiff's counsel is able to handle a putative class action in court on a contingency basis at no cost to Plaintiff, as a result of attorney fee provisions in the agreements, the common fund doctrine, and statutory provisions, it is likely that no attorney would be willing to handle Plaintiff's individual arbitration claims due to the relatively small amount of damages at stake, which are likely far exceeded by the necessary fees and expenses required to arbitrate such claims. Accordingly, it is my opinion that it would be cost prohibitive for Plaintiff to pursue an individual arbitration of his claims.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based on my personal and firsthand

knowledge of the facts and, if called upon as a witness, I could and would competently testify thereto.

Executed on this 10th day of June 2016, in Redlands, California.

Dated: June 10, 2016

By: [Manuscript signature]
Michele M. Vercoski
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
EASTERN DIVISION

FRANK VARELA, on behalf of himself and all other similarly situated,
Plaintiff;
v.
LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC., and DOES 1 through 10, inclusive,
Defendants.

Case No: 5:16-cv-00577

DECLARATION OF PLAINTIFF FRANK VARELA IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION ON AN INDIVIDUAL BASIS, IN THE ALTERNATIVE, A RULE 12(B)(6) MOTION TO DISMISS

DECLARATION OF FRANK VARELA

I, Frank Varela, hereby declare as follows:

1. I am the named Plaintiff in the above-captioned action. The following facts are within my personal knowledge and, if I am called upon to testify in this action, I could and would testify competently thereto. As such, I make this Declaration in support of Plaintiff's Opposition to Defendant's Motion to Compel Arbitration on an Individual Basis and, in the Alternative, a Rule 12(b)(6) Motion to Dismiss.

2. I am an employee of Lamps Plus, and have been an employee for approximately nine (9) years as I was hired in 2007. I am currently employed as a Warehouseman at the Lamps Plus warehouse located in Redlands, California. In my capacity as a Warehouseman, I am responsible for assisting with store transfers, orders for shuttle, add-on for truck deliveries and other miscellaneous duties. My highest level of education is a high school diploma.

3. In March of 2016, I learned that a human resources employee released my W-2 income and tax withholding statement, along with those of every other employee who worked for Lamps Plus during 2015, to an unknown criminal. A few weeks after the data breach, I was informed by the IRS that there was a fraudulent income tax filing under my name. Because of my concern over the loss of my personal information and the subsequent fraudulent filing of my tax returns with my personal information stolen in the data breach, I sought legal help. This is how I have come into contact with my counsel in this matter, and my counsel worked with me to file a complaint in this matter regarding the data breach as a potential class action.

4. I have recently been informed that Lamps Plus is seeking to force me to bring my claims through an arbitration proceeding, instead of in court, and to force me to bring these claims on an individual basis instead of a class action.

5. I have reviewed the Arbitration Agreement that was attached to the declaration of Lucenda Jo Beeson that contained my signature. As stated below, I have no recollection of seeing this arbitration provision and agreeing to the terms of the agreement.

6. When I was hired on April 9, 2007, I was presented with a stack of documents to sign. I have no recollection of reading or agreeing to this arbitration provision as I was provided multiple documents at the same time. I was required to sign all such documents as a condition of my employment with Lamps Plus.

7. I do not recall anyone from Lamps Plus explaining the contents of this arbitration agreement to me.

8. While I do not remember being advised by anyone from Lamps Plus to consult an attorney prior to signing the arbitration provision, even I had been so advised, I could not afford to retain an attorney to review this arbitration provision.

9. When I signed the provision, I do not recall being informed that I have three days to revoke the agreement.

10. When I signed this arbitration provision, I did not understand that, in doing so, I would be waiving my right to a jury trial if I had any employment dispute with Lamps Plus.

11. Further, I did not understand that, in signing this arbitration provision, I would also be waiving my right to a jury trial in any legal dispute between myself and Lamps Plus. As such, I did not understand that this arbitration provision would be applied to disputes arising from a context outside of my employment responsibilities. Particularly, I did not understand that, in signing this arbitration provision, it would apply to a dispute arising from another Lamps Plus employee disclosing mine and my wife's confidential information to anyone outside of Lamps Plus.

12. In my experience, any agreements provided to me by Lamps Plus were drafted exclusively by Lamps Plus. I have never been given the opportunity to participate in negotiating the terms of any agreements I may have had with Lamps Plus. In fact, any agreements provided to me by Lamps Plus have all been presented on a take-it-or-leave-it basis. That is to say, my only choice was to accept all documents along with the job, or reject some or all of the documents and forgo with employment opportunity with Lamps Plus.

13. In fact, it is especially a surprise to me that an arbitration provision that Lamps Plus attempts to apply to all claims regarding my relationship with Lamps Plus, even those claims outside of the context of my employment, is one from almost one decade after I was hired. Lamps Plus drafted the standardized arbitration agreement and it was presented to me entirely as a take-it-or-leave-it basis, which like all documents and agreements Lamps Plus has presented to me, was non-negotiable by me. However, as I stated before, I do not recall ever being provided with this arbitration agreement or agreeing to it.

14. I also believe it is not fair that Lamps Plus is attempting to force me into arbitration of my claims regarding the data breach and theft of my personal information, when it has never needed to initiate an arbitration against me regarding my employment duties, because Lamps Plus could always simply terminate me or demote/suspend me. This means I will always be the one who has to initiate arbitration proceedings should a dispute arise.

15. At any rate, in reading this arbitration provision now, I would have understood it to apply only to employment claims as it is in conjunction with my

employment, and would not apply to my data breach claims, which have nothing to do with my employment agreement.

16. If I had been provided with an arbitration provision that Lamps Plus could use to prohibit me from bringing a claim in court for their release of my personal data to a third party criminal and bringing a class action for the same, I believe I would have taken note of it and would not have agreed to that.

17. Although Lamps Plus agrees to pay for the arbitrator, I am alarmed that I will have to pay the initial filing fee of $2,000 for initiating arbitration, because this is a matter involving three or more parties. Moreover, whether I prevail or not, I would have to cover my own attorney's fees, expert witness fees and other costs.

18. With respect to the latter, I believe that I could not pursue this claim by myself without an attorney representing me, as I cannot determine exactly how the data breach occurred or the extent of harm that me and my wife have been subject to as a result of our personal information being released directly to fraudsters. My wife and I have spent considerable time trying to safeguard our data and we pay to have it monitored professionally and we do it personally. We also know that our stolen data was used to file fraudulent tax returns. We must now continue to pay indefinitely for ongoing credit monitoring and will continue to personally monitor our accounts. However, I do not personally have enough information or expertise to determine on my own what legal claims I could bring and how to value my damages without the help of experts and attorneys.

19. However, I understand that the amount of work that my attorneys and any experts they may retain, would at a minimum, cost well into five-figures in dollars. I understand that because of the relatively small amount that I would be awarded in arbitration alone, it would be difficult to find any attorney to represent me on an entirely contingency fee basis because any recovery would potentially be smaller than fees and costs, which I am responsible for covering, according to the arbitration provision. Therefore, when considering the arbitration initiation fee and the attorney's fees, expert fees and related costs, it would be cost prohibitive for me to undertake an arbitration of just my individual claims.

I declare under penalty of perjury under the laws of the United States of American that the foregoing is true and correct. Executed this 10th day of June, 2016, in Redlands, California.

Dated: June 10, 2016 Respectfully submitted,

By: [Manuscript signature]
Frank Varela
Plaintiff

No. 17-988

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

RULE 29.6 STATEMENT

Petitioner Lamps Plus Holdings, Inc. is the parent corporation to petitioners Lamps Plus, Inc. and Lamps Plus Centennial, Inc. No publicly held corporation owns a 10% or more ownership interest in Lamps Plus, Inc.; Lamps Centennial, Inc.; or Lamps Plus Holdings, Inc.

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Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 26

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The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 701 F. App'x 670. The order of the court of appeals denying rehearing (Pet. App. 6a) is unreported. The order of the district court denying in part Lamps Plus's motion to compel individual arbitration and instead compelling arbitration on a class-wide basis (Pet. App. 7a-23a) is unreported, but is available at 2016 WL 9110161.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2017. Pet. App. 1a. That court denied rehearing on September 11, 2017. Pet. App. 6a. Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including January 10, 2018. The petition for a writ of certiorari was filed on January 10, 2018, and granted on April 30, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

"[T]he differences between bilateral and class-action arbitration are too great" for arbitrators or courts to presume "that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010). Because "class arbitration" is "not arbitration as envisioned by the" Federal Arbitration Act (FAA) and "lacks its benefits," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350-51 (2011), arbitrators or courts may not infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687.

The Ninth Circuit, by a divided vote, did just that by inferring that the parties had implicitly agreed to class arbitration based on the inclusion in the agreement of standard arbitration-clause provisions.

This Court, however, has squarely held that the FAA "requires more" (*Stolt-Nielsen*, 559 U.S. at 687). In particular, there must be a "contractual basis for concluding" that the parties have in fact "*agreed* to"

class arbitration (*id.* at 686). That principle follows naturally from the FAA's "rule[] of fundamental importance" that "arbitration 'is a matter of consent, not coercion.'" *Id.* at 681 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). For that reason, this Court has held, "[a]n arbitrator may employ class procedures *only* if the parties have authorized them." *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 565 (2013) (emphasis added).

As Judge Fernandez succinctly observed in dissent, the decision below is a "palpable evasion of *Stolt-Nielsen*." Pet. App. 5a. The panel majority simply disregarded numerous terms in the parties' arbitration agreement that contemplate bilateral arbitration, and instead purported to divine contractual consent to class arbitration from language found in virtually any standard arbitration clause.

The panel protested otherwise, but its decision involved precisely the type of state-law "interpretive acrobatics" (Pet. App. 3a) in support of a policy preference for class actions that this Court has rejected as incompatible with the FAA. See *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-71 (2015). The Court should reverse the decision below.

A. Factual Background.

Respondent Frank Varela is an employee of Lamps Plus. Pet. App. 8a. At the beginning of his employment, Varela and a representative of Lamps Plus signed a standalone arbitration agreement (the "Agreement"). *Id.* at 24a-35a.[1]

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[1] Employees are permitted to opt out of arbitration within three days after executing the agreement. Pet. App. 27a; ER

The Agreement covers "all claims or controversies ('claims'), past, present or future that I may have against the Company or against its offers, directors, employees or agents * * * or that the Company may have against me." Pet. App. 24a. The Agreement further provides: "Specifically, the Company and *I* mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with *my* employment, or any of the parties' rights and obligations arising under this Agreement." *Id.* at 24a-25a (emphasis added).

The Agreement also informs the employee at the outset that agreeing to arbitration waives any right to resolve disputes with Lamps Plus in court:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

Pet. App. 24a.

The Agreement specifies that the arbitration will be administered by either the American Arbitration Association (AAA) or JAMS (Pet. App. 25a)—two widely-respected arbitration forums.[2] The arbitrator,

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138. ("ER __" refers to the Excerpts of Record in the court of appeals.) Varela did not opt out of arbitration. Pet. App. 10a; ER 138.

[2] It is undisputed (see ER 137-138) that Varela's arbitration agreement includes both the document he signed titled "ARBI-

once appointed, "is authorized to award any remedy allowed by applicable law." *Id.* at 26a.

B. Proceedings Below.

1. In early 2016, Lamps Plus was the victim of a successful phishing attack. An unknown third party mimicked the email address of a high-level Lamps Plus employee and sent an email to an actual Lamps Plus employee requesting the W-2 tax forms of employees. ER 152. The employee, believing she was responding to a supervisor's legitimate request, sent copies of current and former employees' 2015 W-2 forms to the third party. Pet. App. 11a; ER 152. Lamps Plus promptly notified its employees of the attack and offered employees "one-year of credit monitoring services" and "identity counseling." ER 181.

2. Soon after this cyber attack, respondent Varela filed a putative class action lawsuit in California federal court, asserting statutory and common-law claims related to the data breach. ER 178-202. Lamps Plus moved to "compel arbitration on an individual basis" pursuant to Varela's arbitration agreement. ER 144.

The district court purported to grant the motion, but in fact denied the request for individual arbitration and instead ordered a class-wide arbitration. Pet. App. 20a-22a. The district court recognized that Varela had entered into a binding arbitration agree-

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TRATION PROVISION" (Pet. App. 24a) as well as "ATTACHMENT A," which sets forth in more detail the "LAMPS PLUS EMPLOYMENT ARBITRATION RULES AND PROCEDURES" (*id.* at 29a), including presumptive limits on discovery and other provisions consistent with bilateral arbitration. See pages 17-18, *infra*.

ment and that his claims fell within the scope of that agreement. *Id.* at 13a-14a. The court further rejected Varela's arguments that his arbitration agreement was unconscionable. *Id.* at 15a-20a.

On the issue of class arbitration, however, the district court accepted Varela's argument that "the language stating that 'all claims' arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter." Pet. App. 21a.[3]

3. A divided Ninth Circuit panel affirmed the district court's order. Pet. App. 1a-5a.

The panel majority concluded that there was "ambiguity" as to whether the parties had agreed to class arbitration, pointing to the following language in the arbitration provision:

- the waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";

---

[3] In interpreting the arbitration agreement to authorize class arbitration, the district court also sua sponte questioned whether a waiver of class procedures in arbitration would be enforceable in the employment context; one factor in the district court's decision was its view that, under then-extant Ninth Circuit case law, the "enforceability of a class arbitration waiver in the employment contest" was "dubious." Pet. App. 22a. But this Court has since reversed the Ninth Circuit, holding that agreements to arbitrate on an individual basis in the employment context are fully enforceable under the FAA. See *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018).

- the waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- the agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

Pet. App. 3a.

Based on this language, the majority maintained that "*the most reasonable*[] interpretation of this expansive language is that it authorizes class arbitration." Pet. App. 3a.

The majority further inferred "support[]" for its interpretation from (1) the *absence* of any express reference to class actions in other parts of the arbitration clause; (2) the arbitration clause's coverage of all "claims or controversies" that the parties might have against each other; and (3) the provision in the arbitration clause authorizing the arbitrator to "'award any remedy allowed by applicable law.'" Pet. App. 3a-4a. The majority also relied upon the state-law *contra proferentem* doctrine that contractual ambiguities should be "construed against the drafter." *Id.* at 3a-4a.

Judge Fernandez dissented. His dissent stated in full:

> I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen* * * *.

Pet. App. 5a (citation omitted).

SUMMARY OF ARGUMENT

The decision below defies this Court's clear holdings that the FAA preempts state law that would compel parties to submit to class arbitration without a contractual basis for concluding that the parties agreed to authorize that procedure.

The Court has repeatedly explained that, in light of the fundamental differences between class and individual arbitration, the FAA prohibits exactly what the panel below did here: inferring "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685; accord *Oxford Health*, 569 U.S. at 573 (Alito, J., concurring).

The Ninth Circuit sought to avoid the FAA's preemptive force by characterizing its interpretation as an application of ordinary state contract interpretation principles. But its justifications are at odds with this Court's precedents.

First, the Court explained in *Stolt-Nielsen* that, "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" 559 U.S. at 681 (citations omitted). Accordingly, the "FAA requires more" (*id.* at 687)—as a matter of substantive federal law—than "the fact of the parties' agreement to arbitrate" in order to infer an agreement to authorize class arbitration (*id.* at 685). There is nothing "more" in this agreement, and accordingly no basis for ordering class arbitration.

Second, the panel's assertion that it applied neutral state-law principles does not withstand scrutiny.

Rather, its interpretation of the contract in favor of its preference for class procedures is even more implausible than the strained reading of contract language that this Court rejected in *Imburgia*, 136 S. Ct. at 468-71, as inconsistent with the FAA.

Third, the panel's erroneous interpretation cannot be salvaged by relying on the state-law *contra proferentem* doctrine. Because the Agreement is "not ambiguous" (Pet. App. 5a (Fernandez, J., dissenting)), the *contra proferentem* principle is not even implicated. And in all events, that state-law interpretive canon cannot manufacture the contractual basis for class arbitration that the FAA requires as a matter of federal law.

Indeed, if the decision below were affirmed, courts would have virtual carte blanche authority to impose class arbitration whenever the parties' arbitration agreement does not expressly forbid class arbitration. That result would turn *Stolt-Nielsen* on its head. And even on its own terms, the Ninth Circuit's policy preference for class procedures ignores the numerous benefits of traditional, bilateral arbitration that this Court has repeatedly recognized.

Fourth, although the Ninth Circuit's decision must be reversed under *Stolt-Nielsen* because nothing in the arbitration provision suggests that the parties here agreed to authorize class arbitration, the Court may wish to answer the question left open in *Stolt-Nielsen* and articulate the "contractual basis [that] may support a finding that the parties agreed to authorize class-action arbitration." 559 U.S. at 687 n.10. If it chooses to address that issue, the Court should hold that a "clear and unmistakable" authorization of class, collective, or aggregate arbitration in

the contractual text is required to construe an agreement to authorize class arbitration.

Because bilateral arbitration is the default mode of arbitration "envisioned by the FAA" (*Concepcion*, 563 U.S. at 348), parties must clearly specify that they wish to pursue arbitration under a different set of procedures. The "clear and unmistakable" standard is consistent with what this Court has required in other contexts to assess whether the parties have departed from the FAA's default mode for arbitration, such as to find an agreement delegating to the arbitrator threshold questions of arbitrability—which are presumptively for a court to decide.

ARGUMENT

I. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

The Ninth Circuit's interpretation of the parties' arbitration agreement to authorize class arbitration cannot be squared with the FAA and this Court's precedents interpreting it.

A. Because Bilateral Arbitration Is The Type Of Arbitration Envisioned By The FAA, The FAA Requires A Contractual Basis For Class Or Other Representative Arbitration.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House*, 534 U.S. 279, 289 (2002) (quotation marks omitted). The "primary purpose" of the FAA is to "ensur[e] that private agreements to

arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479; see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

An agreement to arbitrate on an individual basis—termed "bilateral arbitration"—is the type of informal, expedient proceeding "envisioned by the FAA." *Concepcion*, 563 U.S. at 351. As this Court has explained on multiple occasions, in bilateral arbitration the "'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Id.* at 348 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

The "virtues Congress originally saw in arbitration" are "its speed and simplicity and inexpensiveness." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018). Accordingly, "one of arbitration's *fundamental* attributes" is its "individualized nature." *Id.* at 1622. And for that reason, the FAA "protect[s] pretty absolutely" agreements to arbitrate using "individualized rather than class or collective action procedures." *Id.* at 1621.

"Class arbitration"—by contrast—is "*not* arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51 (emphasis added). That is because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348; accord *Epic Sys.*, 138 S. Ct. at 1623.

Before reaching the merits, the arbitrator "must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Concepcion*, 563 U.S. at 348. "All of [this] would take much time and effort, and introduce new risks and costs for both sides." *Epic Sys.*, 138 S. Ct. at 1623. Moreover, the delays inherent in class arbitration are undeniable: In *Concepcion*, the Court cited statistics showing that class arbitrations take years to resolve instead of months—and ***none*** of the hundreds of class arbitrations referenced by the Court ended with "a final award on the merits." 563 U.S. at 348-49.

Class arbitration also "greatly increases risks to defendants"—and those risks are compounded by the limited judicial review available. *Concepcion*, 563 U.S. at 350. Many defendants are willing to forgo meaningful judicial review in an individual arbitration because of their desire for a less costly and less adversarial method of resolving disputes. See *ibid.*; *Stolt-Nielsen*, 559 U.S. at 685. But the calculus changes "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once," creating an "unacceptable" risk of error and subjecting defendants to the hydraulic pressure of "settling questionable claims." *Concepcion*, 563 U.S. at 350; see also *Stolt-Nielsen*, 559 U.S. at 686 (explaining that the "commercial stakes of class-action arbitration are comparable to those of class-action litigation").

Of course, "parties may and sometimes do agree to aggregation." *Concepcion*, 563 U.S. at 351. But the FAA "imposes certain rules of fundamental importance, including the basic precept that arbitration

'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 559 U.S. at 680 (quoting *Volt*, 489 U.S. at 479).

The Court therefore held in *Stolt-Nielsen* that the FAA imposes an affirmative requirement limiting the circumstances in which "a party may * * * be compelled under the FAA to submit to class arbitration": a "contractual basis for concluding" that the parties have "*agreed* to" that procedure. *Id.* at 684, 686. Because "class-action arbitration changes the nature of arbitration to such a degree," courts may *not* "presume[]" such consent from "mere silence on the issue of class-arbitration" or infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687. Instead, as a matter of substantive federal law, "the FAA requires more." *Id.* at 687.

The Court has not yet answered what "more" is required: Because the parties in *Stolt-Nielsen* had stipulated "that there was 'no agreement' on the issue of class-action arbitration," this Court left open the question of "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." 559 U.S. at 687 n.10.

The Court need not answer that question definitively here, because under any test the court of appeals erred by relying upon considerations that are incompatible with *Stolt-Nielsen* and this Court's other FAA precedents. If the Court chooses to address that issue, it should hold that an arbitration agreement must clearly and unmistakably authorize class or representative arbitration before the parties may be subjected to those procedures. See pages 27-29, *infra*.

B. The Ninth Circuit's Inference Of An Agreement To Class Arbitration Lacked Any Contractual Basis.

1. The provisions relied upon by the Ninth Circuit do not support an agreement to arbitrate using class procedures.

None of the contract provisions relied on by the panel majority even remotely supports an inference that the parties "agreed to authorize" class arbitration.

To begin with, the panel relied on the Agreement's statement that the employee's agreement to arbitrate is a "waiver of 'any right I may have to file a lawsuit or other civil action or proceeding relating to *my* employment with the Company'" and of "'any right I may have to resolve employment disputes through trial by judge or jury.'" Pet. App. 3a (emphasis added). But as this Court recently reiterated, "a waiver of the right to go to court and to receive a jury trial" is "*the primary characteristic* of an arbitration agreement." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017) (emphasis added).

The panel's reasoning thus renders *Stolt-Nielsen* a nullity. If contractual language describing arbitration's "primary characteristic" were enough, then *any* arbitration agreement that does not expressly waive class procedures could support an inference that the parties agreed to class arbitration. But this Court has clearly held that "the FAA requires more" than "the fact of the parties' agreement to arbitrate" to support an "implicit agreement to authorize class-action arbitration." 559 U.S. at 685.

Similarly, the language in the Agreement that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (Pet. App. 3a) simply means that arbitration replaces litigation in court. See, *e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "in lieu of" as "[i]nstead of or in place of"); WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY (Deluxe ed. 1996) (similarly defining "in lieu of" as "instead of" or "in place of"). Contrary to the court of appeals' view, this phrase does not mean that the arbitration will duplicate every *procedure* available in court, such as the class device.

Indeed, under the majority's approach, that language would also entitle a party to demand that the arbitration process include other court procedures unless the agreement expressly disclaims them, including "the Federal Rules of Civil Procedure" and "a discovery process rivaling that in litigation." *Concepcion*, 563 U.S. at 351. But those procedures, like the class-action device, are "not arbitration as envisioned by the FAA" and "lack[] its benefits." *Ibid.* General language stating the obvious proposition that arbitration is a substitute for court proceedings cannot support an inference that the parties agreed to jettison the "fundamental attributes of arbitration," including "*streamlined* proceedings." *Id.* at 344 (emphasis added).

Moreover, the fact that the arbitration provision encompasses a broad range of substantive disputes—another factor cited by the court of appeals (Pet. App. 4a)—says nothing about the procedures under which the arbitration will be conducted; in particular, the language does not address whether class procedures are available for the resolution of any dispute. In other words, this portion of the Agreement simply

demonstrates that Varela and Lamps Plus agreed "to submit their disputes to an arbitrator"—nothing more. That agreement is precisely what this Court held *cannot* supply the basis for "[a]n implicit agreement to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 685.[4]

For similar reasons, the Agreement's provision authorizing the arbitrator to "'award any remedy allowed by applicable law'" cannot support the panel majority's interpretation. Pet. App. 4a. A class action is not itself a claim or a remedy, but instead a procedural device for aggregating individual claims.

Nearly four decades ago, this Court recognized that the class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged"). The panel majority itself acknowledged this rule, stating that "a class action is a procedural device * * * rather than a separate or distinct claim." Pet. App. 4a (quotation marks omitted). Yet the court failed to recognize that its flawed interpretation of the Agreement runs headlong into that rule.

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[4] Notably, the Agreement states only that the AAA or JAMS employment arbitration rules shall apply (Pet. App. 25a-26a, 29a). It does not refer to the AAA Supplementary Rules for Class Arbitrations (see https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf) or the JAMS Class Action Procedures (see https://www.jamsadr.com/rules-class-action-procedures/).

2. The Ninth Circuit did not meaningfully address the Agreement's language contemplating bilateral arbitration.

The panel majority compounded its error by brushing aside multiple portions of the Agreement's text demonstrating the parties' intent to engage in traditional, bilateral arbitration. For example, the Agreement limits the scope of the claims covered by arbitration to "claims or controversies" that "*I* may have against the Company * * * or that the Company * * * may have against *me*" "aris[ing] in connection with *my* employment, or any of the parties' rights and obligations arising under *this Agreement*." Pet. App. 24a-25a (emphasis added).

Yet the majority concluded that this repeated use of singular personal pronouns was irrelevant because "Varela's claims against the company include those that could be brought as part of a class." *Id.* at 4a.

That analysis makes no sense. Because a class action is nothing more than the sum of each class member's individual claims, Rule 23—which, like other rules of civil procedure, does not apply in arbitration—cannot transform the claims of *other* employees into *Varela*'s claims, and those other individuals' claims plainly do not relate to *Varela*'s employment with Lamps Plus.

The majority further asserted that the Agreement's reference to claims that "'would have been available to the parties by law'" "obviously include[s] claims as part of a class proceeding." Pet. App. 4a. But as discussed above, a class action is not itself a claim or a remedy, and nothing in an agreement to resolve a broad range of substantive disputes indi-

cates an agreement to resolve any such disputes using class procedures.

The majority also had no answer to other language demonstrating the parties' intent to engage in bilateral arbitration. For example, the procedures that are addressed in the Agreement repeatedly refer to "*either* party," reinforcing the Agreement's bilateral nature. Pet. App. 29a-31a (emphasis added). The Agreement also limited the parties to one deposition per side (subject to the arbitrator's discretion to allow additional depositions "upon a showing of substantial need"). Pet. App. 32a. That presumptive limit on discovery underscores that the agreement contemplated only one-on-one arbitration; it is impossible to square with the panel majority's conclusion that the parties agreed to authorize class arbitration.

3. The Ninth Circuit's decision cannot be justified as a neutral application of California contract law principles.

The court of appeals purported to justify its interpretation of the Agreement as an application of California "state law contract principles." Pet. App. 2a. But that does not insulate its erroneous interpretation from FAA preemption for at least two reasons.

First, the "FAA requires," as a matter of federal law, a "contractual basis" for inferring an agreement to class arbitration beyond "the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687. State law rules do not control whether the agreement satisfies that federal principle. Although the panel below sought to characterize its approach as a straightforward application of state-law contract principles, that labeling is not conclusive.

Second, in contrast with the panel majority's purported application of California law, multiple California state courts have rejected arguments that similarly worded arbitration provisions in the employment context can support an implicit agreement to class arbitration. See *Nelsen* v. *Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115 (2012); *Kinecta Alternative Fin. Solutions, Inc.* v. *Super. Ct.*, 205 Cal.App.4th 506 (2012), disapproved of on other grounds by *Sandquist* v. *Lebo Auto., Inc.*, 1 Cal. 5th 233 (2016). In *Kinecta*, the Court of Appeal applied *Stolt-Nielsen* to "conclude that the parties did not agree to authorize class arbitration in their arbitration agreement" through language authorizing arbitration of "'any claim, dispute, and/or controversy that either *I* may have against the Credit Union * * * or the Credit Union may have against *me*, arising from, related to, or having any relationship or connection whatsoever with *my* seeking employment with, employment by, or other association with the Credit Union.'" 205 Cal.App.4th at 519.

Like the arbitration provision here (Pet. App. 25a), the arbitration agreement in *Kinecta* covered employment disputes under a variety of enumerated state and federal statutes. *Id.* at 511 n.1. And also like the arbitration provision here (Pet. App. 24a-25a), the arbitration agreement "ma[de] no reference to employee groups or to other employees," instead "refer[ring] exclusively to 'I,' 'me,' and 'my' (designating [the employee])." 205 Cal.App.4th at 517; see also *Nelsen*, 207 Cal.App.4th at 1130 (following *Kinecta* in a "nearly identical" case).

This contrary "California case law" further reveals that the panel majority's opinion is far from a neutral application of ordinary state-law contract

principles. *Imburgia*, 136 S. Ct. at 469. Rather, it is a "unique," result-oriented interpretation (*ibid.*), apparently motivated by the panel majority's preference for the class device and desire to "eva[de]" this Court's decisions in *Stolt-Nielsen* and *Concepcion*. Pet. App. 5a. As this Court put it in *Imburgia*, although "California courts are the ultimate authority on [California] law," it was for this Court to decide whether "that state law is consistent with the Federal Arbitration Act." *Imburgia*, 136 S. Ct. at 468. The same is true here.[5]

4. The Ninth Circuit's reliance on the state-law contra proferentem *doctrine was misplaced.*

The panel majority "cannot salvage its decision" (*Kindred Nursing Ctrs.*, 137 S. Ct. at 1427) by relying on the state-law canon of contractual interpretation providing that ambiguous terms are construed against the drafter. Pet. App. 3a-4a. According to the court of appeals, the "contractual basis" that the FAA requires (*Stolt-Nielsen*, 559 U.S. at 680) can be satisfied by merely concluding that an arbitration agree-

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[5] For the reasons just discussed, other circuits have uniformly rejected similar attempts to find agreement to class arbitration, holding the claims inconsistent with this Court's decision in *Stolt-Nielsen*. See, *e.g.*, *Opalinski* v. *Robert Half Int'l Inc.*, 677 F. App'x 738, 742 (3d Cir. 2017); *AlixPartners, LLP* v. *Brewington*, 836 F.3d 543, 553 (6th Cir. 2016); *Huffman* v. *Hilltop Cos., LLC*, 747 F.3d 391, 398-99 (6th Cir. 2014); *Reed Elsevier, Inc. ex rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, 599-600 (6th Cir. 2013); *cf. Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643-44 (5th Cir. 2012), abrogated on other grounds by *Oxford Health*, 569 U.S. 564 (concluding that an arbitrator's interpretation of the parties' arbitration agreement to permit class arbitration was inconsistent with *Stolt-Nielsen*).

ment is "ambiguous" (Pet. App. 3a) and then allowing the state-law *contra proferentem* maxim to do the rest of the work.

That reliance was misplaced for at least two reasons.

First, the canon does not apply because, as the dissent put it, "the Agreement was not ambiguous." Pet. App. 5a. Not one word in the arbitration provision suggested that the parties contemplated using class procedures in arbitration. As this Court held in *Imburgia*, "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." 136 S. Ct. at 470.

Second, the FAA forecloses the panel majority's reliance on a state-law canon to manufacture consent to class arbitration that the "FAA requires" to allow class arbitration to proceed. *Stolt-Nielsen*, 559 U.S. at 687. That federal-law standard cannot be satisfied by a state-law rule that does not rest on a finding of consent. The Court explained in *Concepcion* that "class arbitration, to the extent it is manufactured by [application of a state law doctrine] rather than consensual, is inconsistent with the FAA." 563 U.S. at 348.

In concluding that the state-law *contra proferentem* doctrine can justify imposing class arbitration notwithstanding the FAA's preference for traditional, bilateral arbitration, the court below cited *Sandquist* v. *Lebo Automotive, Inc.*, 1 Cal. 5th 233, 248 (2016) (see Pet. App. 3a), which in turn pointed to this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). But *Mastrobuono* did not hold, or even suggest, that

the *Federal* Arbitration Act takes a backseat to any *state*-law maxim.

Mastrobuono decided the question presented—whether the contract at issue authorized the parties to arbitrate punitive-damages claims—by applying the strong federal policy *favoring* arbitration. The Court first drew the pro-arbitration conclusion that punitive-damages claims are arbitrable absent a clear statement of the parties' contrary intent. 514 U.S. at 57-62. The Court then explained that (in the context of that case) construing the language of the arbitration provision against the drafter lent *further support* to the conclusion that the dispute was subject to arbitration. *Id.* at 62-63. Thus, this Court has never held that a state-law contract doctrine could trump the FAA when the two point in *opposite* directions.

If anything, the federal substantive law of arbitrability mandates a pro-arbitration presumption that would prevail over a contrary state-law doctrine. This Court recognized 35 years ago that the FAA "establishes that, as a matter of *federal law*, any doubts concerning the scope of arbitrable issues should be resolved *in favor* of arbitration, whether the problem at hand is the *construction of the contract language itself* or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added); see also *Kristian* v. *Comcast Corp.*, 446 F.3d 25, 35 (1st Cir. 2006) ("Where the federal policy favoring arbitration is in tension with the tenet of *contra proferentem* * * *, the federal policy favoring arbitration trumps the state contract law tenet.").

Here, that presumption calls for compelling arbitration as "envisioned by the FAA" (*Concepcion*, 563 U.S. at 351) rather than stretching to interpret the arbitration agreement to authorize the use of class arbitration, which is antithetical to the type of arbitration the FAA protects.

5. Upholding the decision below would empower courts and arbitrators to impose class procedures on unconsenting parties and create substantial practical problems.

Affirmance of the decision below would make it "trivially easy" for courts "to undermine the [FAA]." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1428. If garden-variety arbitration agreements like the one here could be interpreted to permit class arbitration, defendants who have entered into such agreements will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment. It is hard to imagine a result more inimical to the strong federal policy favoring the type of arbitration envisioned by the FAA.

Permitting class arbitration in these circumstances would trigger other serious adverse consequences.

1. The practical problems of class arbitration would be especially acute when class-action procedures are superimposed upon arbitration without clear agreement by the parties.

The res judicata effect of a class arbitration is doubtful at best, particularly under circumstances like those in this case. Because arbitration "is a matter of consent, not coercion" (*Volt*, 489 U.S. at 479), when an arbitration agreement does not clearly au-

thorize class arbitration, absent class members would have a powerful due process argument that they did not agree to be bound by an award resulting from an arbitration proceeding in which they did not participate. As Justice Alito put it in his *Oxford Health* concurrence (joined by Justice Thomas), "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute." 569 U.S. at 574 (Alito, J., concurring).

At a minimum, these due process concerns increase the procedural complexity required. See *Concepcion*, 563 U.S. at 333 ("If procedures are too informal, absent class members would not be bound by the arbitration."). Even the notice and opt-out procedures employed in class-action litigation in court may not suffice: "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members" who "have not submitted themselves to th[e] arbitrator's authority in any way." *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring). That is because "silence" from absent nonparties as to a particular arbitrator's authority to conduct a class arbitration is not the same as the contractual consent that is required for that arbitrator to have authority over those nonparties. *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring) (citing 1 Restatement (Second) of Contracts § 69(1) (1979)).

The upshot of a class arbitration's vulnerability to collateral attack is that "absent class members [can] unfairly 'claim the benefit from a favorable judgment without subjecting themselves to the bind-

ing effect of an unfavorable one.'" *Oxford Health*, 569 U.S. at 575 (Alito, J., concurring) (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 546-47 (1974)). That result is palpably unfair. An absent "class member" would be able to recover under a favorable decision by the arbitrator, but could invoke due process principles to avoid being bound by an unfavorable decision.

2. The policy preference for class actions that may have animated the decision below is not a permissible basis under the FAA for imposing class arbitration.

Nearly three decades ago, this Court rejected the argument that arbitration should be denied in the employment context because the agreement did not provide for class procedures. *Gilmer* v. *Interstate/Lane Johnson Corp.*, 500 U.S. 20, 30-32 (1990) (compelling individual arbitration of a claim alleging a violation of the Age Discrimination in Employment Act). And in *Concepcion*, this Court specifically rejected policy arguments that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." 563 U.S. at 351; accord *American Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 238 (2013). As this Court recently underscored, "*Concepcion*'s essential insight" is that courts may not "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic Sys.*, 138 S. Ct. at 1623.

Moreover, the Ninth Circuit failed to heed this Court's repeated recognition that "there are real benefits to the enforcement of arbitration provisions" calling for traditional, bilateral arbitration, including "allow[ing] parties to avoid the costs of litigation."

Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105, 122-23 (2001).

Indeed, this Court has been "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City*, 532 U.S. at 109, 123 (citing *Gilmer*, 500 U.S. at 30-32). On the contrary, the lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Ibid.*

Likely for these reasons, studies have shown that employees who arbitrate their claims are more likely to prevail than those who go to court. See, *e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See *ibid.* A 2004 report compiled a number of employment arbitration studies and concluded that employees were 19% more likely to win in arbitration than in court. See Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), available at goo.gl/nAqVXe. As one scholar recently agreed, "there is no evidence that plaintiffs fare significantly

better in litigation [than in arbitration]"; rather, arbitration is "favorable to employees as compared with court litigation." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (quotation marks omitted; alterations in original).

C. An Arbitration Agreement Permits Class Or Representative Procedures Only If The Agreement's Text Clearly And Unmistakably Authorizes Such Procedures.

This Court in *Stolt-Nielsen* "had no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." 559 U.S. at 687 n.10. For the reasons explained above, the Court can reverse the Ninth Circuit's judgment here without reaching that question because the Agreement's text contains *no* basis for an agreement to class arbitration.[6]

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[6] Because the parties here agreed that the court would decide whether their agreement permitted class arbitration, this case does not present the question—also left unresolved in *Stolt-Nielsen* (559 U.S. at 680) and *Oxford Health* (569 U.S. at 569 n.2)—whether the availability of class arbitration is among these gateway issues of arbitrability that are presumptively for a court to decide. That said, the fundamental differences between class and bilateral arbitration that this Court has recognized strongly indicate that the important decision of whether the parties agreed to traditional, bilateral arbitration or instead have agreed to arbitrate the claims of hundreds or thousands of absent parties is one that is presumptively for a court, not a mere procedural detail. *Cf. Stolt-Nielsen*, 559 U.S. at 685 (explaining that whether class arbitration is available is about far more than "merely what 'procedural mode' [is] available to present [a plaintiff's] claims").

If the Court nonetheless decides to address the question left open in *Stolt-Nielsen*, however, it should hold that the FAA requires the same "clear and unmistakable" indication needed in other contexts to depart from the FAA's default rules.

The Court has recognized that "gateway question[s]" of "arbitrability"—*i.e.*, "whether the parties have submitted a particular dispute to arbitration"—are presumptively for the courts, not arbitrators, to decide. *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Such gateway questions include, but are not limited to, "whether parties have a valid arbitration agreement at all" (*Oxford Health Plans*, 569 U.S. at 569 n.2) and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" (*Howsam*, 537 U.S. at 83).

Because the FAA imposes a default rule that these gateway issues of arbitrability are "for judicial determination," parties must "clearly and unmistakably provide otherwise" in order to contract around that rule. *Howsam*, 537 U.S. at 83 (quoting *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). The same rationale justifies a "clear and unmistakable" standard for contracting around the traditional, bilateral mode of arbitration. See pages 10-11, *supra*.

This Court has also explained that the "clear and unmistakable" standard is meant to prevent courts from "forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U.S. at 84. Just as "courts might hesitate to interpret silence or ambiguity" to override the default rule that questions of arbitrability are for a court to decide (*First Options*, 514 U.S. at 945), so too should courts

require far more than silence or ambiguity before imposing class procedures on a party that did not clearly consent to them.

The clear and unmistakable standard further has the virtue of familiarity—courts already apply it in related contexts. And it is appropriately stringent, requiring an express mention (or something close to it) of class or representative arbitration in the contract before class procedures may be imposed. But it is also sufficiently flexible to account for the various ways parties may demonstrate their clear intent to authorize class arbitration—without being reduced to a "magic words" test.

In short, the FAA's default mode of arbitration is bilateral arbitration, and the Court should hold that the FAA requires a clear and unmistakable indication to the contrary in the parties' agreement to override that presumption.

II. There Is No Jurisdictional Issue.

At the petition stage, Varela argued for the first time that the district court's order compelling class-wide arbitration was a non-appealable order "directing arbitration to proceed." Opp. 20-22 (citing 9 U.S.C. § 16(b)(2)).

That argument is wrong, which is presumably why the Court concluded that it posed no obstacle to granting review.

To begin with, the district court's order also dismissed Varela's claims. Pet. App. 23a. That dismissal unquestionably rendered the order final. As this Court held in *Randolph*, when a district court orders arbitration and dismisses the plaintiff's claims, the order is "'a final decision with respect to an arbitra-

tion' within the meaning of § 16(a)(3), and an appeal may be taken." 531 U.S. at 86-87 (quoting 9 U.S.C. § 16(a)(3)).

Varela noted at the petition stage that the district court's dismissal here was "without prejudice," while the dismissal in *Randolph* was "with prejudice." Opp. 23. But the dismissal here had the exact same effect as the dismissal with prejudice in *Randolph*: it "disposed of the entire case on the merits" and "left no part of it pending before the court." 531 U.S. at 86. A dismissal in this context is without prejudice "only in th[e] sense" that it does not "preclud[e] the parties from bringing a new action after completing arbitration," which "is not enough to show that the dismissal was interlocutory rather than an appealable final decision" under Section 16(a)(3). *Interactive Flight Techs., Inc.* v. *Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001) (citing *Randolph*).[7]

Varela also argued that the district court's dismissal "was not adverse to Lamps Plus." Opp. 23. But the court's order compelled a *class-wide* arbitration that Lamps Plus never sought—and actively argued *against*. See ER 48-51.

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[7] Every other circuit to reach the issue has similarly held that a dismissal without prejudice in favor of arbitration is a final, appealable order. See *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005); *Westlake Styrene Corp.* v. *P.M.I. Trading Ltd.*, 71 F. App'x 442, 442 (5th Cir. 2003); *Blair* v. *Scott Specialty Gases*, 283 F.3d 595, 601-02 (3d Cir. 2002); *Salim Oleochemicals* v. *M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002), abrogated on other grounds by *Katz* v. *Cellco P'Ship*, 794 F.3d 341 (2d Cir. 2015).

Indeed, even if there had been no dismissal, Lamps Plus was entitled to appeal because the district court's order effectively *denied* Lamps Plus's motion to compel arbitration. Lamps Plus asked for "an order directing that * * * arbitration proceed *in the manner provided for in such agreement*"—i.e., on an individual basis. 9 U.S.C. § 4 (emphasis added); ER 144. That the district court purported to grant Lamps Plus's motion is not controlling: in matters of appellate jurisdiction, this Court is "concerned, not with form, but with substance." *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 259 (1933).

Varela is wrong in contending that Lamps Plus received an "order granting relief it requested," and asserting that Lamps Plus complained only because the arbitration ordered was "not in the procedural manner [it] preferred." Opp. 22-23. This Court in *Stolt-Nielsen rejected* the proposition that class-wide arbitration involves "merely what 'procedural mode' is available to present [a party's] claims." 559 U.S. at 687. It recognized that the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.* at 686. Accordingly, Lamps Plus was entitled to appeal an adverse decision imposing these fundamental changes over its objections.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Did the court of appeals have appellate jurisdiction over the petitioners' appeal of the district court's order granting petitioners' motion to compel arbitration, directing arbitration to proceed, and dismissing respondent's claims without prejudice?

2. Does the Federal Arbitration Act (FAA) preempt the conventional state contract-law principles applied by the court of appeals in construing the distinctive language of the arbitration agreement at issue to authorize class arbitration?

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Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71 (2014) 52

Alexander J.S. Colvin, *An Empirical Study of Arbitration: Case Outcomes and Processes*, 8 J. Empir. Legal Stud. 1 (2011). 52

INTRODUCTION

The lower courts in this case engaged in a quintessential exercise in state-law contract construction when they interpreted an ambiguous arbitration agreement to allow arbitration on a classwide basis. In seeking to overturn that determination, petitioner Lamps Plus asks this Court to rule on a question that is not properly before any appellate court because the district court's order directing arbitration was not appealable. Moreover, Lamps Plus lacks standing to appeal the dismissal of respondent Frank Varela's claims without prejudice because Lamps Plus asked for the dismissal and does not seek to set it aside.

If this Court nonetheless addresses the merits, it should hold that the Federal Arbitration Act (FAA) does not preempt the lower courts' application of California contract law to the parties' agreement. This Court has held that the FAA requires determinations about class arbitration to rest on a "contractual basis." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). Far from displacing state contract law, *Stolt-Nielsen* makes state law dispositive. The lower courts applied established principles of California contract law, including the rule that ambiguous contracts are construed against the drafter, to determine whether the parties *agreed* to class arbitration. Those principles do not disfavor arbitration, and the FAA does not preempt them. The lower courts' decision that the agreement to arbitrate was not limited to individual claims thus fully comports with the FAA.

JURISDICTION

Lamps Plus correctly describes the facts establishing the timeliness of its invocation of this Court's

jurisdiction. The Court's jurisdiction, however, also depends on whether the case was properly "in the court of appeals." 28 U.S.C. § 1254. Here, Lamps Plus appealed an order of the district court *granting* its motions to compel arbitration and to dismiss Mr. Varela's claims without prejudice. Pet. App. 23a. As explained below, that order is not appealable insofar as it compelled arbitration, and Lamps Plus lacks standing to appeal a dismissal that it asked for and does not seek to overturn. Because the appeal was not properly in the court of appeals, this Court lacks jurisdiction under section 1254.

STATUTES INVOLVED

In addition to the provisions set forth in the brief of Lamps Plus, this case involves the FAA's appellate-review provision, 9 U.S.C. § 16; the statutes defining the jurisdiction of this Court and the court of appeals, 28 U.S.C. §§ 1254 and 1291; and the contract interpretation principles of California Civil Code §§ 1635, 1636, 1638, 1644, 1649, and 1654. These statutes are reproduced in pertinent part in the appendix to this brief.

STATEMENT OF THE CASE

Respondent Frank Varela has been an employee of petitioner Lamps Plus, Inc., since 2007. In March 2016, Lamps Plus allowed a criminal to gain access to copies of W-2 income and tax withholding statements of approximately 1,300 of its employees, including Mr. Varela. As a result, a fraudulent 2015 federal income tax return was filed in Mr. Varela's name.

Mr. Varela filed suit in the United States District Court for the Central District of California against Lamps Plus, Inc., and two related corporations (collectively, "Lamps Plus") asserting federal and state-law

claims on behalf of a class of current and former employees of Lamps Plus and others injured by the exposure of personally identifying information. Lamps Plus moved to compel arbitration under a provision in Mr. Varela's employment agreement requiring arbitration of "all claims that may ... arise in connection with [his] employment." Pet. App. 25a. Simultaneously, Lamps Plus moved to dismiss Mr. Varela's claims.

The arbitration provision states (among other things) that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment," *id.* at 24a, that all claims "that, in the absence of this Agreement, would have been available to the parties by law" are arbitrable, *id.* at 26a, and that the arbitrator "is authorized to award any remedy allowed by applicable law," *id.* Lamps Plus's motion to compel arbitration contended that the agreement authorized arbitration only of individual claims and prohibited Mr. Varela from asserting claims on behalf of a class. Mr. Varela opposed arbitration on numerous grounds, including that his claims were outside the agreement's scope and that the agreement was unconscionable. He also contended that the agreement, if applicable and valid, permitted class arbitration.

The district court rejected Mr. Varela's arguments against arbitration. The court concluded that the dispute was within the arbitration agreement's scope because it arose in connection with his employment. Applying California law requiring a showing of both procedural and substantive unconscionability to set aside a contract, the court found the agreement procedurally unconscionable because it was an adhesion contract imposed as a condition of employment, but not substantively unconscionable because it did not require

excessive fees, its remedial provisions were not unfairly one-sided, and it did not unduly curtail discovery.

The court also found that the agreement authorized class arbitration. The court recognized that, under *Stolt-Nielsen*, a party may not be compelled to participate in class arbitration absent a contractual basis for concluding that it agreed to do so. Pet. App. 21a. The court determined that the language of the agreement was ambiguous as to whether it allowed arbitration of class claims. Construing that ambiguity against Lamps Plus as the drafter of the agreement, the court concluded that there was a contractual basis for class arbitration. *Id.* at 22a. The court also noted that a waiver of class claims "in the employment context would likely not be enforceable" under the National Labor Relations Act (NLRA), *id.* (citing *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018)), but its ruling did not rest on that point.

Based on these rulings on the agreement's validity and proper construction, the court granted Lamps Plus's motion to compel arbitration without limiting its order to Mr. Varela's individual claims. The court further granted Lamps Plus's motion to dismiss Mr. Varela's claims, without prejudice. *Id.* at 23a.

Lamps Plus appealed, arguing that it was aggrieved by the district court's refusal to limit its order compelling arbitration to Mr. Varela's individual claims. The Ninth Circuit affirmed in an unpublished, non-precedential opinion, finding that the parties had agreed to class arbitration. *Id.* at 2a.[1]

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[1] Relying on *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *rev'd sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which postdated the district court's decision, Mr. Varela

(*Footnote continued*)

The court began by recognizing that, under *Stolt-Nielsen*, parties may be compelled to arbitrate on a class basis only if they have contractually agreed to do so. *Id.* The court also observed that the agreement's failure expressly to mention class arbitration was not dispositive under *Stolt-Nielsen*; rather, the question was whether the contract was properly interpreted to embody an agreement on class arbitration. *Id.*

To determine whether the contract permitted class arbitration, the court applied "state-law contract principles," which govern interpretation of arbitration agreements. *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Consistent with California contract-law principles, the court first considered the text of the contract and found significant support for class arbitration. The court focused on the contract's distinctive language providing for arbitration "in lieu of any and all lawsuits or other civil legal proceedings," together with other broad language including permission to assert all claims and obtain all remedies available at law. *Id.* at 3a–4a. The court pointed out that class claims and remedies would have been available to Mr. Varela in court, and that the phrase "civil legal proceedings" encompasses "class proceedings." *Id.* The court did not find the agreement unambiguous, but concluded that its terms, taken together, "can be reasonably read to allow for class arbitration." *Id.* at 3a.

Because the contract was "capable of two or more constructions, both of which are reasonable," *id.* (quoting *Powerine Oil Co. v. Super. Ct.*, 118 P.3d 589, 598

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argued on appeal that the agreement would be unlawful under the NLRA if it allowed only individual arbitration. The court, however, did not address that issue.

(Cal. 2005)), the court applied the California contract-law principle that "[a]mbiguity is construed against the drafter" of a contract—"a rule that 'applies with peculiar force in the case of a contract of adhesion,'" *id.* (quoting *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016)). The court concluded that "the construction posited by Varela"—"that the ambiguous Agreement permits class arbitration"—was proper under California contract law and supplied "the necessary 'contractual basis' for agreement to class arbitration" under *Stolt-Nielsen*. *Id.* at 4a–5a.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction because this case was not properly in the court of appeals. The district court's decision had two parts. Neither was properly appealable by Lamps Plus. The first part compelled arbitration under 9 U.S.C. § 4. The FAA expressly prohibits appeal of orders directing arbitration under section 4, *see* 9 U.S.C. § 16(b)(2), and Lamps Plus's contention that the order directing arbitration is really an order *refusing* to direct the arbitration it wanted distorts the plain meaning of the statute.

The district court also granted Lamps Plus's request that Mr. Varela's claims be dismissed without prejudice. Lamps Plus argues that the dismissal is a final, appealable decision under 9 U.S.C. § 16(a)(3). Even assuming the dismissal of Mr. Varela's claims is "final," however, Lamps Plus lacks standing to appeal it because Lamps Plus is not aggrieved by it and does not seek to set it aside. That order in Lamps Plus's favor does not allow it to appeal the unappealable order compelling arbitration.

If the Court reaches the merits, it should affirm. The FAA does not preempt the lower courts'

application of California contract law principles to determine that the agreement at issue permits class arbitration proceedings because the FAA does not displace generally applicable state contract-law rules. On the contrary, it *requires* their application to arbitration agreements in the same way they are applied to other contracts. This Court's decisions concerning class arbitration thus hold that the determination whether an arbitration provision permits class proceedings must be based on generally applicable principles of contract interpretation used to discern the terms of the parties' agreement.

The FAA does not preempt the California contract-law principles applied in this case. California law, like contract law generally, seeks to ascertain the intent of contracting parties as objectively manifested in their agreement. The common meaning of the words used in a contract control, but if meaning is ambiguous and the ambiguity cannot be resolved through other means, the ambiguity is construed against the party that drafted the agreement and created the ambiguity.

These principles apply generally to contracts subject to California law—including arbitration agreements. Such generally applicable interpretive principles are not preempted by the FAA because they comply with its fundamental requirement of equal treatment of arbitration agreements and other contracts. They do not disfavor arbitration agreements because they are not triggered by distinctive features inherent in arbitration agreements.

Whether the lower courts correctly applied these neutral principles is a question of state law ill-suited to resolution by this Court. Only if this Court is convinced that a court would not have applied them to a non-

arbitration agreement in the same way may it find a violation of the FAA. There is no basis for such a finding here because the lower courts correctly focused on distinctive language in the arbitration provisions that supports the conclusion that they are not limited to bilateral proceedings and are reasonably read to allow class arbitration. Lamps Plus's contrary view founders on the contractual language, the agreement's incorporation of procedural rules that authorize class proceedings, and its express provision delegating matters concerning its interpretation to the arbitrator.

Lamps Plus's fallback assertion that the Court should adopt a new rule requiring clear and unmistakable language authorizing class arbitration is not properly before the Court because it was neither raised and decided below nor presented by the petition for certiorari. Lamps Plus's policy arguments against class arbitration are likewise misplaced because this case is not about the circumstances under which class arbitration does or does not satisfy due process, but only about whether the parties agreed to authorize an arbitrator to consider certifying a class. Nor does this case involve whether employees are better off litigating in court or arbitrating: The sole issue here is what kind of arbitration they agreed to. Finally, Lamps Plus's belated assertion that the availability of class arbitration is a question of arbitrability that is presumptively for a court to decide takes it nowhere, because it already received a decision on that question by the courts—even though the agreement it drafted delegates questions of arbitrability to the arbitrator.

ARGUMENT

I. This Court lacks jurisdiction because the district court's orders were not appealable.

This Court's jurisdiction depends on whether a case was properly "in" the court of appeals. 28 U.S.C. § 1254; *see, e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554–55 (2014); *Hohn v. United States*, 524 U.S. 236, 241 (1998); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *United States v. Nixon*, 418 U.S. 683, 690 (1974). When a court of appeals has decided an appeal over which it lacked jurisdiction, this Court likewise lacks jurisdiction to address the merits and may only vacate the judgment of the court of appeals and remand for dismissal of the appeal. *See, e.g.*, *Will v. Hallock*, 546 U.S. 345, 349, 355 (2006).

A. The FAA precludes appeals of orders compelling arbitration.

The district court in this case compelled arbitration on the motion of Lamps Plus. The FAA permits appeals from *denials* of motions to order arbitration, *see* 9 U.S.C. § 16(a)(1)(B), but explicitly prohibits appeals from interlocutory orders directing arbitration to proceed. 9 U.S.C. § 16(b)(2). A court of appeals may not consider an appeal's merits in the face of such an express statutory denial of jurisdiction. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

The FAA is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Accordingly, "Congress sought to prevent parties from frustrating arbitration through lengthy preliminary appeals." *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d

727, 730 (4th Cir. 1991). Thus, in general, "a party cannot appeal a district court's order unless, at the end of the day, the parties are forced to settle their dispute other than by arbitration." *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 99 (2d Cir. 1997). Appellate courts routinely refuse appeals from interlocutory orders requiring arbitration. *See, e.g.*, *Preferred Care of Del., Inc. v. Estate of Hopkins*, 845 F.3d 765, 768 (6th Cir. 2017).

Attempting to skirt the FAA's limits on appellate jurisdiction, Lamps Plus characterizes the district court as having "effectively *denied* Lamps Plus's motion to compel arbitration." Pet. Br. 31. Although Lamps Plus's motion to compel arbitration argued that the court should direct that arbitration take place in a particular manner, the relief sought in the motion was an order compelling arbitration under the parties' agreement, *see* Pet. Br. 31, and that is exactly what the district court ordered based on its construction of the agreement. There is no doubt that the district court directed arbitration to proceed, and that it did so based upon its authority under 9 U.S.C. § 4. And the FAA's text is plain: "[A]n appeal may not be taken from an interlocutory order ... directing arbitration to proceed under section 4 of this title." 9 U.S.C. § 16(b)(2).

Lamps Plus appears to suggest that section 16(b)(2)'s cross reference to section 4, which authorizes courts to compel arbitration "in the manner provided for in [the parties'] agreement," 9 U.S.C. § 4, means that a party is free to appeal an order compelling arbitration as long as it claims that the order did not conform with the parties' agreement. That view would create a gigantic loophole in section 16(b)(2), and Lamps Plus unsurprisingly offers no support for it.

The straightforward meaning of section 16(b)(2) is that it precludes appeals from orders in which district courts exercise their section 4 authority to compel arbitration, not that it precludes appeals only if they do so correctly. Thus, courts of appeals agree that they lack jurisdiction over appeals from orders that compel arbitration, "albeit not in the first-choice" manner of the party that moved to compel. *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016); *see also Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 637–38 (7th Cir. 2011).

In *Al Rushaid*, the Fifth Circuit considered whether it had appellate jurisdiction over an order that compelled arbitration but denied the defendant's request that arbitration take place before the International Chamber of Commerce. *Id.* at 303. Concluding that the appeal would frustrate section 16's purpose of promoting arbitration, the court held that it lacked jurisdiction. *Id.* at 304; *see also Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1154 (9th Cir. 2004) (holding that the court lacked jurisdiction over an appeal of an order compelling arbitration in front of one tribunal rather than another); *Augustea*, 126 F.3d at 98 (holding that the court lacked jurisdiction over an appeal of an order to arbitrate in London instead of New York).

Similarly, in *Blue Cross*, the Seventh Circuit held that an order denying a motion to direct arbitrators to "hold separate rather than consolidated proceedings" was not a refusal to "order arbitration to proceed" appealable under 9 U.S.C. § 16(a)(1)(B), 671 F.3d at 638, even though the moving party described its motion as a petition "to compel a de-consolidated arbitration," *id.* at 636. As then-Chief Judge Easterbrook explained, an order that *allows* arbitration to proceed, though not in

the manner a party prefers, is not appealable regardless of a party's "artful pleading": Calling such an order a refusal to direct arbitration to proceed "does not make it so." *Id.* at 638; *see also id.* ("Unlike Humpty Dumpty, ... a litigant cannot use words any way it pleases. ... Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one.").

The reasoning of the courts of appeals in these cases is correct and applicable here. If parties may appeal every order directing arbitration that does not comport with their wishes, the FAA's policy of "rapid and unobstructed enforcement of arbitration agreements" will be thwarted. *Moses H. Cone*, 460 U.S. at 22. Indeed, under Lamps Plus's reasoning, a plaintiff that sought class arbitration could characterize an order compelling individual arbitration as a denial of its request that the court direct class arbitration. Appeals of orders directing arbitration would proliferate, and parties could engage in lengthy appellate litigation over the proper forum and location, the proper arbitrator, and the proper arbitration procedures before the arbitration even began. *See Blue Cross*, 671 F.3d at 638.

B. Lamps Plus lacks standing to appeal the district court's dismissal order, which it sought and does not challenge.

Recognizing the weakness of its argument that the district court refused to order arbitration, Lamps Plus relies principally on the assertion that the district court's order is an appealable "final decision with respect to an arbitration," 9 U.S.C. § 16(a)(3), because the district court dismissed Mr. Varela's claims without prejudice. Even assuming the dismissal was a final order, however, Lamps Plus lacks standing to appeal it

because it provided precisely the relief Lamps Plus sought—dismissal of its opponent's claims—and Lamps Plus does not seek to overturn it.

Lamps Plus relies on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), where this Court found that a plaintiff whose claims were dismissed with prejudice in favor of arbitration could appeal the dismissal under section 16(a)(3). The Court adopted the "well-developed and longstanding meaning" of "the term 'final decision'" in decisions construing 28 U.S.C. § 1291, which likewise confers appellate jurisdiction over "final decisions" of district courts. *Id.* at 86. The Court deemed the dismissal with prejudice final because it "disposed of the entire case on the merits" and left the court "nothing to do but execute the judgment." *Id.* (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994), *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), and *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

It is a great leap from the proposition that a plaintiff can appeal a decision that finally, and over its objections, dismisses its own claims with prejudice to the assertion that a defendant can appeal the dismissal without prejudice of the plaintiff's claims—a dismissal that it affirmatively sought and does not seek to overturn. Even assuming the dismissal is nominally final, well-established principles of appellate practice developed under 28 U.S.C. § 1291's parallel authorization of appeals from final orders preclude the exercise of jurisdiction over a defendant's attempt to appeal an order granting its own motion to dismiss.[2]

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[2] Because the dismissal was without prejudice it did not, unlike the order in *Randolph*, end the litigation *on the merits*. And

(*Footnote continued*)

This Court and the lower courts have long held that a party may not appeal a favorable decision. As this Court has put it, "[o]nly one injured by the judgment sought to be reviewed can appeal," and a party is "not ... injured by [a case's] termination in his favor." *Parr v. United States*, 351 U.S. 513, 516–17 (1956); *see also Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in the judgment); *Mathias v. Worldcom Techs., Inc.*, 535 U.S. 682 (2002); *California v. Rooney*, 483 U.S. 307, 311 (1987). Thus, courts regularly reject a defendant's effort to appeal from a dismissal of its opponent's claims, unless the defendant asserts that a dismissal without prejudice should have been with prejudice. *See, e.g., Rodriguez v. 32d Leg. of V.I.*, 859 F.3d 199, 207 (3d Cir. 2017); *Swatch Group Mgmt. Servs. v. Bloomberg L.P.*, 756 F.3d 73, 92–93 (2d Cir. 2014); *Concerned Citizens of Cohoctin Valley, Inc. v. N.Y. State Dep't of Env'tl Conservation*, 127 F.3d 201, 204 (2d Cir. 1997); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095 & n.10 (11th Cir. 1996); *see also Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 647 & n.4 (D.C. Cir. 1998); *H.R. Techs., Inc. v. Astechnologies, Inc.*, 275 F.3d 1378, 1382–83 (Fed. Cir. 2002).[3]

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it resulted in no "judgment" that could be "executed." Its effect was no different than if the court had merely stayed the claim after directing arbitration to proceed. Nonetheless, some circuits have extended *Randolph* to allow appeals by plaintiffs whose claims have been dismissed without prejudice in favor of arbitration. *See, e.g., Interactive Flight Techs., Inc. v. Swissair Swiss Air Transport Co.*, 249 F.3d 1177 (9th Cir. 2001). Assuming their correctness, such decisions do not address an appeal by a *defendant* who procures dismissal without prejudice of the plaintiff's claims.

[3] This Court has recognized that an appeal from a final order dismissing an opponent's claims may lie in the unusual instance where the order incorporates adverse rulings with preclusive or

(*Footnote continued*)

Here, the dismissal granted Lamps Plus the relief it sought with respect to Mr. Varela's claims. Lamps Plus does not claim entitlement to a different form of dismissal; it does not challenge the dismissal at all. The relief it seeks on appeal—an addition to the order granting its motion to compel arbitration specifying that arbitration is limited to Mr. Varela's individual claims—would not affect the validity of the dismissal or alter it in any way. Lamps Plus thus lacked standing to appeal the dismissal, even assuming its finality.

Moreover, the mere existence of an arguably final dismissal favorable to Lamps Plus does not transform the unappealable and nonfinal order compelling arbitration into an appealable order. This Court recently held that a party cannot manufacture finality of an otherwise unappealable interlocutory order by engineering a case's dismissal—even where, unlike here, the dismissal is with prejudice and, unless overturned, irrevocably terminates the appealing party's claims. *Microsoft*, 137 S. Ct. at 1712–15; *see also Keena v. Groupon, Inc.*, 886 F.3d 360, 364–65 (4th Cir. 2018) (holding that a plaintiff cannot make an order compelling arbitration appealable by moving to dismiss its own claims). If a plaintiff may not use an order it requested dismissing its claims as a vehicle to appeal an otherwise unappealable interlocutory order, it should follow that a defendant likewise may not use the grant of its request that the plaintiff's claims be dismissed to appeal such an order.

Permitting an appeal in such circumstances allows manipulation and evasion of the limits Congress placed

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precedential effect on the prevailing party in future proceedings, *see Camreta v. Greene*, 563 U.S. 692, 702–09 (2011), but a district court's dismissal without prejudice has no such effect.

on appeals in matters involving arbitration. The FAA both prohibits appeals of orders directing arbitration and provides that when a plaintiff has attempted to assert arbitrable claims in court, a district court shall stay those claims pending arbitration. *See* 9 U.S.C. § 3. Such a stay is not a final, appealable order. *Randolph*, 531 U.S. at 87 n.2. The courts of appeals agree that staying rather than dismissing arbitrable claims is ordinarily the correct course, and some go further and hold that dismissal is improper. *See Katz v. Cellco P'ship*, 794 F.3d 341, 344–47 (2d Cir. 2015) (outlining positions of various circuits and adopting the view that dismissal is improper). In *Katz*, the Second Circuit held that allowing courts discretion to dismiss is inconsistent with the FAA's policy of restricting appeals of orders compelling arbitration because "[a]ffording judges such discretion would empower them to confer appellate rights expressly proscribed by Congress." *Id.* at 347. This Court need not go so far here—indeed, it cannot, because no party has sought to overturn the dismissal order on appeal. But the same argument against allowing the manufacturing of appellate rights applies even more strongly here, where it is only the happenstance of the district court's ordering relief *for* Lamps Plus (dismissal of Mr. Varela's claims) that is *more* favorable than the relief that the FAA authorizes (a stay) that provides the ostensible basis for appeal. That order in Lamps Plus's favor does not permit it to appeal the otherwise unappealable order compelling arbitration.

II. The FAA does not preempt application of state contract-law principles to determine whether an agreement permits class proceedings.

A. The FAA is premised on state contract law.

The FAA requires enforcement of contractual obligations to arbitrate, but it does not federalize contract law. Section 2 of the FAA, 9 U.S.C. § 2, provides that provisions for arbitration in contracts involving interstate commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The statute does not, however, define what a contract is, how it is formed, how its terms are construed, or what defenses may exist to its enforcement. In all those respects, the statute relies on application of principles that already "exist at law or in equity."

Because "[t]here is no federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), the basic principles of contract law that the FAA presupposes are in almost all cases supplied by state common and statutory law. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *First Options*, 514 U.S. at 944; *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474–75 (1989). As this Court has construed the FAA, it does not supplant state contract-law principles, but overlays on them a federal-law requirement that contracts calling for arbitration be "as enforceable as other

contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).[4]

In other words, the FAA's main effect on state contract law is to "establish[] an equal-treatment principle." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Under this principle, states may not subject arbitration provisions to "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (citation omitted). "The FAA thus preempts any state rule discriminating on its face against arbitration," and "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that ... have the defining features of arbitration agreements." *Id.*

Within this constraint, state contract law continues to govern arbitration provisions just as it governs other contracts: The FAA does not "purport[] to alter background principles of state contract law regarding the scope of agreements." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). Indeed, because the FAA is premised on the existence of an enforceable contract, it imposes no obligations to arbitrate beyond those that a party has assumed under a contract, as determined by the application of neutral principles of state contract law. As this Court has emphasized, "the

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[4] Cases involving collective bargaining agreements, which are governed by federal statutory and common law, are an exception to the rule that generally applicable state contract law governs arbitration agreements. *See, e.g., Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957). Arbitration provisions in contracts exclusively governed by federal common law, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), would be another exception, although such contracts are rare, *see Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691–92 (2006).

FAA does not require parties to arbitrate when they have not agreed to do so"; it "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478. Whether the parties have entered into an agreement, what the agreement covers, and what procedures it calls for are all matters of contract. *See id.* at 479. As long as state contract law adheres to the FAA's equal-treatment principle, *see Kindred*, 137 S. Ct. at 1426, it governs decisions on such matters because "the interpretation of private contracts is ordinarily a question of state law," *Volt*, 489 U.S. at 474.

B. This Court's decisions recognize that state contract law governs the determination whether an arbitration agreement authorizes class proceedings.

1. This Court's holdings concerning class arbitration represent a specific application of the foregoing principles, not a distinct doctrine that supplants state contract law. The Court established its approach in *Stolt-Nielsen*, where an arbitral panel had held that class arbitration was permissible based on "its own policy preference" for class proceedings, 559 U.S. at 676, even though the parties themselves stipulated that their contract did not incorporate "any agreement on the issue of class arbitration," *id.* at 673. In line with the fundamental norm that a contractual undertaking to arbitrate is the touchstone of section 2's requirement that arbitration provisions be enforced, the Court held in *Stolt-Nielsen* that the FAA required that the arbitrators' decision be set aside because the statute does not permit class arbitration to be imposed on the parties without a "contractual basis for concluding that [they] *agreed* to do so." 559 U.S. at 682.

As the Court put it, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Id.* *Stolt-Nielsen* thus concluded that requiring class arbitration because of policy considerations divorced from what the parties agreed to—or doing so solely because the parties agreed to arbitrate, without considering whether they agreed to class arbitration—violates the FAA's prescription that parties are required to arbitrate only when a contract obligates them to do so. *See id.* at 674–77, 685. Moreover, because "class-action arbitration changes the nature of arbitration," it "cannot be presumed" that agreeing to arbitrate is the same as agreeing to class arbitration. *Id.* at 685.

In so holding, the court acknowledged that "the interpretation of an arbitration agreement is generally a matter of state law." *Id.* at 681. Determination of that state-law question, of course, remains subject to the FAA's overarching axiom that arbitration is a matter of agreement, *see id.*, and to the equal-treatment principle requiring that the issue be determined under neutral, generally applicable contract-law rules, *see Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (cited in *Stolt-Nielsen*, 559 U.S. at 681). Otherwise, *Stolt-Nielsen* left what it held to be the determinative question—"whether the parties *agreed to authorize* class arbitration," 559 U.S. at 687—to be determined by the same state-law contract principles that determine whether parties have agreed to anything else.

Stolt-Nielsen's statement that the "intentions" of the parties are "control[ling]," *id.* at 682, reinforces that the determination whether a contract permits class arbitration depends on state contract-law rules

that ordinarily structure inquiries into the meaning of contracts. *Stolt-Nielsen*'s references to ascertaining the "parties' intentions" are a shorthand way of describing the set of considerations governing interpretation not only of arbitration agreements, but of "any other contract" as well. *Id.* at 682 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). In a broad sense, all principles of contract interpretation shape "the attempt 'to ascertain the intention of the parties'" manifested in the contract. *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 935 (2015) (emphasis removed) (quoting 11 Williston on Contracts § 30:2 (4th ed.)). *Stolt-Nielsen* calls for application of those generally applicable interpretive principles, not a freewheeling inquiry into the parties' subjective intentions untethered to contract law.

Stolt-Nielsen recognizes that ascertaining contractual intent often involves application of legal doctrines aimed, for example, at resolving ambiguities in contractual language. *See* 559 U.S. at 674 n.6. Thus, in holding that "the FAA requires" a determination "whether the parties *agreed to authorize* class arbitration," *id.* at 687, *Stolt-Nielsen* calls for nothing more (or less) than the use of applicable contract-law principles to determine "'the contractual rights and expectations of the parties'" with respect to class arbitration. *Id.* at 682 (quoting *Volt*, 489 U.S. at 479). Those principles will in almost every case be state-law principles, *id.* at 681, which, under the FAA, govern the determination of parties' contractual rights unless they disfavor arbitration. *See Perry*, 482 U.S. at 492 n.9.[5]

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[5] *Stolt-Nielsen* itself might have been a rare case where applicable contract-law principles would not have come from state law,

(*Footnote continued*)

2. The Court reiterated *Stolt-Nielsen*'s holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). There, the Court succinctly described *Stolt-Nielsen* as holding that the FAA prohibits "imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation." *Id.* at 347. At the same time, the Court acknowledged that parties "may and sometimes do agree to aggregation" and that, when they do, the FAA requires enforcement of such agreements because "arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Id.* at 351. Throughout, *Concepcion* stressed the contractual nature of FAA arbitration, *see, e.g.*, *id.* at 344, and it acknowledged the FAA's preservation of state contract-law doctrines that "place arbitration agreements on an equal footing with other contracts." *Id.* at 339.

Concepcion extended *Stolt-Nielsen* by holding that the FAA preempted a state-law rule prohibiting waiver of the right to participate in class proceedings because it "interfere[d] with arbitration," *id.* at 346, and presented "an obstacle to the accomplishment of the FAA's objectives," *id.* at 343. The anti-waiver rule, the Court concluded, evinced hostility to arbitration by preventing parties from agreeing to bilateral arbitration, which the Court saw as the principal form of

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as it was arguable that general maritime law, a form of federal common law, *see Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996), governed the parties' contract, *see Stolt-Nielsen*, 559 U.S. at 673. The Court did not have to resolve that issue because the arbitrators had not decided the class-arbitration issue on the basis of *any* form of contract law. *See id.* at 673. In this case, by contrast, there is no dispute that the parties' contract is governed by California state law.

"arbitration as envisioned by the FAA," *id.* at 351, and by effectively requiring classwide arbitration without a contractual basis, *id.* at 346.

Concepcion, in sum, held that the FAA requires enforcement of agreements prohibiting class arbitration as well as agreements allowing it. Class arbitration, the Court held, may not be "manufactured" on the basis of doctrines not rooted in contractual rights and obligations, but must be "consensual." *Id.* at 348. That is, class arbitration must be based on "the arbitration agreement itself or some background principle of contract law that would affect its interpretation," *id.* at 347, provided that the state-law principle does not "disfavor[] arbitration," *id.* at 341.

3. The Court's decision in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), confirms this understanding of *Stolt-Nielsen* and *Concepcion*. In *Oxford Health*, a plaintiff sought to proceed on behalf of a class after being compelled to arbitrate under an agreement providing that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration ...." *Id.* at 566. The parties agreed to submit the question whether their agreement allowed class arbitration to the arbitrator, who concluded that the agreement authorized class arbitration because it provided for arbitration of "all" the disputes that otherwise could have been brought as a "civil action," including class disputes. *Id.* at 567.

The defendant in *Oxford Health*, like Lamps Plus here, argued that the arbitrator's decision violated the FAA as construed in *Stolt-Nielsen* because it ordered class arbitration "without a sufficient contractual basis." *Id.* at 571. That argument, the Court held,

fundamentally "misread[] *Stolt-Nielsen*." *Id.* at 571. As the Court explained, *Stolt-Nielsen* did not rest on the absence of a "sufficient" contractual basis for class arbitration. *Id.* Rather, the Court emphasized, the outcome in *Stolt-Nielsen* followed from the fact that "[t]he parties in *Stolt–Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration." *Id.* *Stolt-Nielsen* held that the FAA prohibits requiring class arbitration in the absence of "*any* contractual basis for ordering class procedures." *Id.* Under *Stolt-Nielsen*, an order regarding class arbitration violates the FAA if it rests neither on "a determination regarding the parties' intent," nor on a neutral "default rule" of contract law. *Id.*

In *Oxford Health*, the arbitrator complied with the FAA's requirement that he "construe the parties' contract," *id.*, in determining the availability of class arbitration. Because the arbitrator's determinations were, "through and through, interpretations of the parties' agreement," *id.* at 570, he did not exceed his powers under the FAA. And given the arbitrator's compliance with the FAA's core requirement, the Court did not proceed to consider whether the arbitrator was right or wrong—whether he "misapprehended the parties' intent," *id.* at 571. The Court held that it lacked authority to review the *correctness* of the arbitrator's interpretation of the contract because, with respect to matters properly submitted to an arbitrator, the FAA limits judicial review and does not permit vacatur of an arbitrator's decision for mere error. *Id.* at 568–69.

Although this last feature of *Oxford Health* is not present in this case, the decision is highly instructive as to the limits of the FAA's commands concerning class arbitration. The FAA requires that the

availability of class arbitration be determined as a matter of the contractual obligations assumed by the parties, in light of the terms of their agreement construed under principles of contract law that satisfy the FAA's equal-treatment principle. And just as the FAA does not make the correctness of an arbitrator's decision on that matter a question of law for a court to decide, so it does not transform into a question of *federal* law the correctness of a court's use of neutral *state-law* principles to interpret an arbitration agreement. Absent a violation of the equal-treatment principle, the interpretation of an arbitration agreement remains, as this Court stated in *Volt*, "a question of state law, which this Court does not sit to review." 489 U.S. at 474.

III. The California contract-law principles applied by the lower courts in this case are consistent with the FAA.

The courts below applied well-settled principles of California contract law to determine whether, in entering into the arbitration agreement at issue, the parties agreed to permit class arbitration. That determination was fully consistent with this Court's holdings in *Stolt-Nielsen*, *Concepcion*, and *Oxford Health* that a decision that class arbitration is permissible must rest on a "contractual basis," *Oxford Health*, 569 U.S. at 571, reflecting that the parties "*agreed to authorize* class arbitration," *Stolt-Nielsen*, 559 U.S. at 687. The California contract-law rules the courts applied to reach that determination satisfy the FAA's equal-treatment principle because they do not "apply only to arbitration or ... derive their meaning from the fact that an agreement to arbitrate is at issue," *Concepcion*, 563 U.S. at 339, nor do they "disfavor[] contracts that ... have the

defining features of arbitration agreements," *Kindred*, 137 S. Ct. at 1426.

A. Interpretive principles of California contract law seek to ascertain the parties' objectively manifested intent.

The California contract-law doctrines applied below are fully consistent with this Court's emphasis on the "consensual basis of arbitration" under the FAA, *Stolt-Nielsen*, 559 U.S. at 687, as well as the Court's statements that in interpreting an arbitration agreement, "as with any other contract, the parties' intentions control," *id.* at 682 (quoting *Mitsubishi*, 473 U.S. at 626). Under California law, "[t]he fundamental goal of contract interpretation is to give effect to the mutual intention of the parties." *Bank of the West v. Super. Ct.*, 833 P.2d 545, 552 (Cal. 1992). This basic principle is enshrined in a statute providing that "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636.

As in most jurisdictions, the inquiry into contractual intent under California contract law does not focus on the parties' subjective intentions, but on "the objective manifestation of the parties' intent" as found in "the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding." *Reigelsperger v. Siller*, 150 P.3d 764, 767 (Cal. 2007) (citation omitted); *see also Patel v. Liebermensch*, 197 P.3d 177, 183 (Cal. 2008); *People v. Shelton*, 125 P.3d 290, 294 (Cal. 2006); *Brant v. Calif. Dairies, Inc.*, 48 P.2d 13, 16 (Cal. 1935).

Under this conventional approach, the parties' "intent is to be inferred, if possible, solely from the written

provisions of the contract." *AIU Ins. Co. v. Super. Ct.*, 799 P.2d 1253, 1264 (Cal. 1990). Thus, "[i]f contractual language is clear and explicit, it governs." *Bank of the West*, 833 P.2d at 552. Again, the rule is incorporated in California's Civil Code, which provides that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638. Absent evidence that parties mutually intended to use words in a technical sense or adopt a special meaning given them by usage, California courts interpret contractual words "in their 'ordinary and popular sense.'" *AIU*, 799 P.2d at 1264 (quoting Cal. Civ. Code § 1644). "Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." *Id.*

If a contract's language is ambiguous, a court must look further to determine what the parties mutually agreed. Absent extrinsic evidence that sheds light on the shared meaning ascribed by the parties to ambiguous language, *see, e.g.*, *Decter v. Stevenson Props., Inc.*, 247 P.2d 11, 17 (Cal. 1952), California law provides two principal means of determining the intention reflected in ambiguous contractual language.[6] First, ambiguity "is resolved by interpreting the ambiguous provisions

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[6] Under California law, extrinsic evidence is relevant only if it helps determine the parties' mutual intent; the "uncommunicated subjective intent" of one of the parties is "irrelevant." *Reigelsperger*, 150 P.3d at 767; *accord*, *Brant*, 48 P.2d at 16; *Vaillette v. Fireman's Fund Ins. Co.*, 22 Cal. Rptr. 2d 807, 814 (Cal. Ct. App. 1993); *Winet v. Price*, 6 Cal. Rptr. 2d 554, 558 & n.3 (Cal. Ct. App. 1992). Here, no evidence suggests that the parties engaged in any communications that shed light on what they agreed regarding class arbitration, *see* J.A. 11–12, and Lamps Plus's unilateral, unexpressed intentions on that subject thus have no bearing on the determination of what the parties "agreed to do" with respect to class arbitration, *Stolt-Nielsen*, 559 U.S. at 684.

in the sense the promisor ... believed the promisee understood them at the time of formation." *AIU*, 799 P.2d at 1264; *see also Bank of the West*, 833 P.2d at 552; Cal. Civ. Code § 1649 ("If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."). Second, "[i]f application of [the foregoing] rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist." *AIU*, 799 P.2d at 1264; *accord*, *Bank of the West*, 833 P.2d at 552. The latter rule is incorporated in California Civil Code § 1654, which provides that "[i]n cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

Particularly where form contracts are concerned, the party who caused the uncertainty to exist is the drafter. *Victoria v. Super. Ct.*, 710 P.2d 833, 839 (Cal. 1985). Thus, "ambiguities in standard form contracts are to be construed against the drafter." *Id.* at 835; *accord*, *Sandquist*, 376 P.3d at 514. Where a contract of adhesion—one offered on a take-it-or-leave-it basis with no opportunity for the weaker party to negotiate—is at issue, "ambiguities will be subject to stricter construction against the party with the stronger bargaining power." *Victoria*, 710 P.2d at 742; *accord*, *Sandquist*, 376 P.3d at 514.

B. The FAA does not preempt California's principles of contract interpretation.

There is no dispute that the lower courts in this case applied the foregoing principles of contract construction to determine whether the arbitration

provision reflected agreement to authorize class arbitration: The courts first carefully analyzed the terms of the agreement and then, finding it ambiguous on the point, construed it against the drafter, Lamps Plus. Nothing in this Court's jurisprudence suggests that the application of these legal standards to determine the meaning of the parties' agreement is preempted by the FAA.

1. The lower courts' application of California law comports entirely with *Stolt-Nielsen*'s core requirement that class arbitration requires "a contractual basis for concluding that the parties *agreed* to do so." 559 U.S. at 684. The California-law principles applied below are aimed precisely at determining what contracting parties have agreed to do. Courts applying them reach conclusions that "are, through and through, interpretations of the parties' agreement," *Oxford Health*, 569 U.S. at 570, as this Court's decisions command.

Moreover, those principles are fully consistent with the Court's holdings that "[a]rbitration under the [FAA] is a matter of consent." *Volt*, 489 U.S. at 479. The state-law rules involved here are directed at determining the "intent of the parties," *Stolt-Nielsen*, 559 U.S. at 684, in the sense in which intent is relevant to their "contractual rights and expectations," *id.* at 682 (quoting *Volt*, 489 U.S. at 479). That is, California contract law is aimed at determining the mutual intentions of the parties as objectively manifested in their contract. *See Bank of the West*, 833 P.2d at 552.

California's approach to determining the intentions expressed in contracts generally, and ambiguous contracts in particular, is consistent with norms of contract interpretation that prevail in most states. The

reliance on objectively manifested intent rather than unexpressed subjective intent, the primacy of unambiguous text as the expression of that intent, and the use of various means, including construction against the drafter, or "*contra proferentem*," to determine contractual intent in cases of textual ambiguity—all these are widely accepted principles of contract interpretation. *See* 11 Williston on Contracts §§ 31.4, 30:4, 30:7, 31:12, 32:12. Such principles of interpretation and construction of contracts are the tools courts use to "ascertain the intention of the parties" as "expressed or implied" in the contract. *Id.* § 30:2.

Stolt-Nielsen itself recognized that such interpretive doctrines, as distinct from policy preferences that do not reflect the meaning of the parties' agreement, are essential to determining the contractual rights and expectations on which the availability of class arbitration procedures depends. The Court, for example, criticized the arbitrators in that case for relying on policy arguments concerning the utility of class proceedings rather than on rules for "determining the parties' intent when an express agreement is ambiguous." 559 U.S. at 675 n.6. The Court also recognized that contractual rights with respect to arbitration, like other subjects of contracts, may depend on applicable "default rules" and "background principle[s]." *Id.* at 673, 685; *see also Oxford Health*, 569 U.S. at 571. Indeed, *Stolt-Nielsen* did not rule out use of *any* principles of contract interpretation to determine the availability of class arbitration: It foreclosed only determinations that are *not* based on a construction of the parties' contract. *See Stolt-Nielsen*, 559 U.S. at 684, *Oxford Health*, 569 U.S. at 571.

2. This Court's FAA jurisprudence also demands that any state-law contract principles applied to an arbitration agreement be generally applicable and that they not disfavor arbitration. *Kindred*, 137 S. Ct. at 1426. The California-law principles applied in this case readily clear those hurdles.[7]

There is no doubt that the rules of interpretation at issue here are generally applicable—that is, that they "apply to 'any' contract." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1622. In *Sandquist v. Lebo Automotive, Inc.*, the California Supreme Court described the interpretive rule that was dispositive here—that ambiguous contractual provisions are construed against the drafter—as a "general principle of contract interpretation" that "applies equally to the construction of arbitration provisions." 376 P.3d at 514. Moreover, the California statutes that codify the relevant principles are expressly applicable to all contracts: The part of the Civil Code in which those provisions are found—entitled "Interpretation of Contracts," Cal. Civ. Code div. 3, pt. 2, t. 3—begins with a provision stating that "[a]ll contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code." Cal. Civ. Code § 1635. None of the Code sections setting forth the principles applicable here differentiates between arbitration agreements and other contracts.

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[7] To the extent the FAA also requires states to apply state contract law to questions about the *scope* of arbitrable issues with "due regard ... to the federal policy favoring arbitration," *Volt*, 489 U.S. at 476, California law also accords with that requirement, *see Sandquist*, 376 P.3d at 519, and the district court in this case applied that principle in finding the parties' dispute to be within the scope of the agreement, a question not at issue here.

Nor do the principles applied in this case "disfavor[] contracts that ... have the defining features of arbitration agreements." *Kindred*, 137 S. Ct. at 1426. The rules that the parties' mutual intentions are determined by their objective manifestation in a contract's terms and that ambiguities not otherwise resolvable are to be construed against the drafter do not "hing[e] on the primary characteristic[s] of an arbitration agreement." *Id.* at 1427. Ambiguity may be common in arbitration agreements, as in many other types of contracts, but it is hardly essential to their nature. Arbitration agreements, no less than contracts of other kinds, can avoid construction against the drafter by avoiding ambiguity.

Likewise, California's forceful application of the rule resolving ambiguities against the drafter to ambiguities in contracts of adhesion, *Sandquist*, 376 P.3d at 514, does not "covertly" discriminate against arbitration, *Kindred*, 137 S. Ct. at 1426. Although arbitration provisions affecting employees and consumers are commonly contracts of adhesion, that feature does not distinguish them from contracts in general. As this Court noted in *Concepcion*, contracts of adhesion are ubiquitous, 563 U.S. at 346–47, and "States remain free to take steps addressing the concerns that attend contracts of adhesion" even though such steps may apply to arbitration agreements in common with other adhesive contracts, *id.* at 347 n.6.

In short, the contract-law principles applied in this case are not "too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." *Kindred*, 137 S. Ct. at 1427. They do not

apply only to "a slim set of both patently objectionable and utterly fanciful contracts." *Id.* They "in fact apply generally," *id.* at 1428 n.2, to the full range of contracts subject to California law, not just to "arbitration agreements and black swans." *Id.* at 1428.

3. This Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), confirms that the FAA does not preempt the doctrine that ambiguities are construed against the drafter. *Mastrobuono* concerned whether an arbitration agreement authorized the award of punitive damages. Applying the basic principle that arbitration is a matter of contract, *id.* at 57 (citing *Volt*, 489 U.S. at 476), the Court stated that "the case before us comes down to what the contract has to say about the arbitrability of [a] claim for punitive damages." *Id.* at 58. The agreement did not expressly authorize punitive damages, and the Court found it ambiguous in light of provisions that pointed in both directions on the issue. On one hand, the agreement said it was governed by New York law, and New York law purported to prohibit punitive damages in arbitration. On the other hand, the agreement incorporated NASD rules, which allowed "damages and other relief," terms that, "[w]hile not a clear authorization of punitive damages," "appear[ed] broad enough at least to contemplate such a remedy." *Id.* at 61. The Court resolved the ambiguity in favor of allowing punitive damages in part because the parties opposing punitive damages had drafted the agreement; the Court held that they "cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Id.* at 62.

Notably, the Court derived this rule from the common law of the two *states* whose laws were "arguably relevant to this controversy." *Id.* at 63 n.9. The Court explained its application of this state-law rule to the arbitration agreement as follows:

> Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result. That rationale is well suited to the facts of this case. As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners.

Id. at 63 (footnote omitted).

This Court's application of the state-law principle that ambiguities are construed against the drafter when determining the intent of the parties to an ambiguous arbitration agreement lays to rest any suggestion that the principle "singles out arbitration agreements for disfavored treatment," *Kindred*, 137 S. Ct. at 1425, or "stand[s] as an obstacle to the accomplishment of the FAA's objectives," *Concepcion*, 563 U.S. at 343. The Court's later decision in *Imburgia* likewise casts no doubt on the applicability to arbitration agreements of the rule requiring construction of ambiguous language against the drafter. *See* 136 S. Ct. at 470. The Court's observation that "the reach of the canon construing contract language against the drafter must

have limits," *id.*, refers to the very limits incorporated in California's contract-interpretation principles—namely, that the principle applies only where a court has determined that a contract is ambiguous, *id.* The principle as expressed in California law is therefore not preempted.

* * *

In sum, through the lower courts' application of California contract law, Lamps Plus got what it was entitled to under the FAA as this Court construed it in *Stolt-Nielsen*, *Concepcion* and *Oxford Health*: a determination that "there is a contractual basis for concluding that the part[ies] *agreed*" to allow class arbitration. *Stolt-Nielsen*, 559 U.S. at 684. That determination did not rest on policy considerations divorced from the parties' agreement, or on the mere existence of an arbitration agreement, but on "interpretations of the parties' agreement." *Oxford Health*, 569 U.S. at 570. And those interpretations were in turn based on generally applicable principles of state contract law that are neutral with respect to arbitration and, thus, not preempted by the FAA. The lower courts' decision complies with the requirements of the FAA.

IV. Lamps Plus's claim that the courts below misinterpreted the agreement does not establish a violation of the FAA.

A. The correctness of the courts' contract interpretation is a state-law question.

Lamps Plus's position rests on its arguments that in carrying out the analysis required by the FAA, the lower courts misread the contract. But as explained above, in requiring enforcement of contractual obligations to arbitrate, the FAA does not transform the

interpretation of an agreement to arbitrate into a question of federal law. *Volt* made the point plainly when it distinguished between the FAA's requirement that contractual obligations to arbitrate be enforced on equal terms with other contracts (a matter of federal law, *see* 498 U.S. at 478) and the underlying determination of what a particular contract means ("a question of state law, which this Court does not sit to review," *id.* at 474). Here, the lower courts complied with the FAA by basing their determination as to class arbitration on their interpretation of the contract under generally applicable principles of state law. Lamps Plus's arguments, even taken at face value, add up only to a claim of error on the state-law side of the equation—the reading of the contract.

In *Volt*, this Court lacked authority to override the California Supreme Court's state-law contract construction, because the determination of a state's highest court on a state-law matter is conclusive. *See Mastrobuono*, 514 U.S. at 60 n.4; *see also Murdock v. City of Memphis*, 87 U.S. 590, 635 (1875); *Imburgia*, 136 S. Ct. at 468. Although this Court has power to review a *federal* appellate court's decision on a state-law matter, *see Mastrobuono*, 514 U.S. at 60 n.4., there is generally little reason for it to do so, *see, e.g.*, *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Here, there is no adequate reason.

First, Lamps Plus's question presented does not ask this Court to decide any state-law question, but only whether it violates the FAA to permit class arbitration in this case. *See* Pet. i; Pet. Br. i. A state-law question of contract construction is not fairly included in that question presented and would not have merited a grant of certiorari if it were. Second, this court typically

accepts a court of appeals' ruling on a matter of the law of a state within its circuit, *see Richards v. United States*, 369 U.S. 1, 16 n.35 (1962), and it is still more deferential to "a construction of state law agreed upon by the two lower federal courts," *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988)). Third, once this Court has announced the principles of federal law that frame construction of an arbitration provision, "it is usually not [the Court's] function in the first instance to construe ... arbitration clauses." *AT&T Techs., Inc. v. Comm'c'ns Workers of Am.*, 475 U.S. 643, 651 (1986). For each of these reasons, Lamps Plus's request that this Court engage in de novo review of the correctness under state law of the lower courts' interpretation of the agreement in this case is unwarranted.

B. The lower courts correctly applied neutral California contract law.

This Court has held that, in an extreme case, a purported application of even neutral state-law contract principles to an arbitration agreement may be so lacking in justification that it does not truly reflect generally applicable contract law because state law in fact "would not interpret contracts other than arbitration contracts the same way." *Imburgia*, 136 S. Ct. at 469. Nothing in the decisions of the lower courts here, however, suggests such an aberration. Rather, their findings of ambiguity and their resolution of the ambiguity against the drafter reflect correct applications of state-law principles.

1. The lower courts correctly found the agreement ambiguous because of affirmative indications in it that could lead a reasonable layperson—whose

understanding is dispositive under California law, *see AIU*, 799 P.2d at 1299—to believe that it would authorize class proceedings in arbitration if an arbitrator determined that certification of a class was appropriate. The arbitration clause's broad references to the claims, proceedings, and remedies available in arbitration, together with its incorporation of arbitral rules permitting class proceedings, provide strong support for reading it to authorize class proceedings, and for application of the principle that any ambiguity on the subject should be resolved against the drafter.

The arbitration agreement, as the lower courts noted, broadly waives an employee's right "to file a lawsuit or other civil action or proceeding" and provides that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." Pet. App. 24a. As the court of appeals pointed out, this language refers not just to lawsuits but also to attendant "proceedings"—a term that, as the court of appeals pointed out, readily encompasses "class proceedings." *Id.* at 3a. Moreover, as Lamps Plus itself points out, one common meaning of "in lieu of" is "in place of." Pet. Br. 15. Lamps Plus does not explain how a purely individual arbitration could reasonably be said to take the "place" of class proceedings. Thus, as the court of appeals stated, "[t]hat arbitration will be 'in lieu of' a set of actions that includes class actions can be reasonably read to allow for class arbitration." Pet. App. 3a.

Lamps Plus objects that this reading would, if accepted, allow an employee to demand that any other procedure applicable in court, such as "the Federal Rules of Civil Procedure" or "a discovery process rivaling that in litigation" be "duplicate[d]" in arbitration.

Pet. Br.15. Lamps Plus's argument confuses "proceedings"—the word used in the agreement—with "procedures." And it wrongly assumes a hypothetical agreement in which the "in lieu of any and all lawsuits and other civil legal proceedings" phrase exists in isolation. Here, the agreement contains provisions addressing procedures and discovery that would render the reading Lamps Plus hypothesizes unreasonable. *See* Pet. App. 25a-26a (incorporating American Arbitration Association (AAA) or JAMS employment dispute arbitration rules), 29a–35a (setting forth additional rules). By contrast, those provisions in no way undercut the reasonableness of a lay reader's understanding that class proceedings, like purely bilateral lawsuits, would have an analog in the arbitration process.

That understanding is supported by other features of the agreement, including its provisions that "all disputes, claims or controversies ... relating to the [parties'] employment relationship" shall be resolved in arbitration, *id.* at 24a, and that arbitration will include "all claims ... in connection with [the employee's] employment ... that, in the absence of this Agreement, would have been available to the parties by law," *id.* at 25a. Again, as the court of appeals pointed out, the matters that the agreement sends to arbitration include disputes and controversies that have classwide dimensions, and the claims that would be available to the employee by law in the absence of the agreement "obviously include claims as part of a class proceeding." *Id.* at 4a.

Lamps Plus contends that this language merely emphasizes that arbitration "encompasses a broad range of substantive disputes," Pet. Br. 15, but that response fails to come to grips with the language quoted above

that extends the agreement's coverage to disputes, controversies, and claims that encompass those that could be asserted on behalf of a class. Moreover, as the court of appeals pointed out, even the part of the agreement that lists specific substantive claims subject to arbitration would tend to reinforce the understanding that the agreement encompasses class disputes because the types of claims listed are ones (such as race and sex discrimination) that are often pursued on behalf of a class. *See* Pet. App. 4a.

Additionally, the agreement provides that an arbitrator may "award any remedy allowed by applicable law." *Id.* at 26a. As the court of appeals observed, to the extent that applicable law would permit a court to award a classwide remedy in an action brought by Mr. Varela, the agreement authorizes an arbitrator to award the same relief. *Id.* at 4a.[8] Lamps Plus objects that "[a] class action is not itself a claim or a remedy, but instead a procedural device for aggregating individual claims." Pet. Br. 16. That observation is true as far as it goes, but it does not answer the point that classwide remedies can only be awarded if the procedural device of a class action is available, *see Zepeda v. INS*, 753 F.2d 719, 730 n.1 (9th Cir. 1983), and that claims can be aggregated only through that procedural device. Thus, if Mr. Varela could use the class-action device in court to assert claims on behalf of a class and obtain

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[8] *Cf. Mastrobuono*, 514 U.S. at 61 n.7 ("[I]t would seem sensible to interpret the 'all disputes' and 'any remedy or relief' phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award." (quoting *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 10 (1st Cir. 1989))).

classwide remedies, the same device must be potentially available in arbitration to fulfill the agreement's terms allowing the arbitrator to entertain all claims that would be available by law and award all remedies that would be allowed by law.

2. The reasonable interpretation that these provisions contemplate class arbitration is underscored by the agreement's express incorporation of the employment arbitration rules of both JAMS and AAA. Both organizations have rules providing expressly for class arbitration if arbitrators determine that class treatment is appropriate under the parties' agreement and the circumstances of a case.[9] Lamps Plus asserts that the arbitration providers' class arbitration rules are irrelevant because the agreement "states only that the AAA or JAMS employment arbitration rules shall apply" and "does not refer to" the class action rules. Pet. Br. 16 n.4. But both sets of class arbitration rules specifically state that they apply in arbitrations "pursuant to any of the [provider's] rules" and "shall supplement any other applicable ... rules" of the provider. AAA Class Arbitration Rule 1(a); *see* JAMS Class Arbitration Rule 1(b). The class arbitration rules thus *expressly* apply in cases governed by the employment dispute rules specified in the parties' agreement. That the rules selected by the arbitration agreement contemplate that the arbitrator will consider whether to allow a class proceeding reinforces that the agreement is reasonably read to allow a court to refer class claims to arbitration. That inference is further underscored by

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[9] *See* AAA Supplementary Rules for Class Arbitrations, https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf; JAMS Class Action Procedures, https://www.jamsadr.com/rules-class-action-procedures/.

the fact that the agreement modifies the providers' rules in certain respects by providing for specific procedural matters that would otherwise be addressed by the rules, *see* Pet. App. 29a–35a, but contains no language suggesting displacement of applicable class arbitration rules and procedures.[10]

The parties' agreement, moreover, broadly grants the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforcement or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.* at 30a. This provision is, in this Court's terminology, a "delegation clause" providing for arbitration even of "threshold issues concerning the arbitration agreement," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). Its breadth readily encompasses not only such matters of "arbitrability," but also the authority to address procedural matters such as whether to certify a class. Its presence strongly supports the conclusion that the agreement does not unambiguously require a court to refer a case to arbitration on an individual basis only, but permits class claims to be referred for the arbitrator's consideration of whether to allow arbitration to proceed on a class basis.

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[10] The AAA and JAMS class arbitration rules provide that an *arbitrator* may not consider the existence of the rules as a basis for inferring an agreement to classwide arbitration. AAA Class Arbitration R. 3; JAMS Class Arbitration R. 2. But that is a very different matter from whether a *court* may consider the parties' incorporation of the rules as part of the basis for inferring that they agreed to allow class claims to be referred to arbitration so that the arbitrator could make the required determinations whether class treatment is permissible.

The delegation clause, indeed, would most likely have the broader effect of making the question whether the arbitration agreement permits class arbitration a question for the arbitrator, rather than the judge, even if that question were viewed as a question of arbitrability otherwise reserved for a court. *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 399 (2d Cir. 2018) (holding that an agreement empowering an arbitrator to determine questions of "arbitrability" delegates to the arbitrator the issue whether an agreement permits class arbitration); *see also Dish Network LLC v. Ray*, __ F.3d __, 2018 WL 3978537 (10th Cir. Aug. 21, 2018); *Spirit Airlines, Inc. v. Maizes*, __ F.3d __, 2018 WL 3866335 (11th Cir. Aug. 15, 2018).

In this case, the issue whether the class arbitration determination is properly for the court or the arbitrator—a question reserved by the Court in both *Stolt-Nielsen*, 559 U.S. at 680, and *Oxford Health*, 569 U.S. at 569 n.2—was not raised or decided below. Nor, as a consequence, was the impact of the delegation clause on that "who decides" question considered. Even so, the delegation clause remains a strong indication that Lamps Plus is wrong in asserting that the parties did not intend to allow the arbitrator even to consider whether to certify a class. And it renders completely irrelevant Lamps Plus's suggestion that the availability of class arbitration is an issue of "arbitrability" that is "presumptively for a court," Pet. Br. 27 n.6, because the existence of a delegation clause overcomes that presumption. *Rent-A-Center*, 561 U.S. at 69 n.1.

3. Against all these indications that a reasonable lay reader could understand the arbitration agreement to permit class arbitration, Lamps Plus principally

relies on the agreement's use of the terms "I" and "the Company" in, for example, a phrase referring to arbitration of "claims or controversies ... that I may have against the Company ... or that the Company may have against me." Pet. App. 24a. Lamps Plus regards the "use of singular personal pronouns," Pet. Br. 17, as establishing unequivocally that the agreement provides only for bilateral arbitration.

In the context of this agreement, the language Lamps Plus cites is not sufficient to dispel any ambiguity over the authorization for class arbitration or to overcome the conclusion that the most reasonable reading of the agreement is that it permits class arbitration. That the arbitration agreement requires arbitration of Mr. Varela's claims against Lamps Plus does not exclude the possibility that the arbitration may encompass claims that he could assert on an aggregate basis together with those that are exclusively and individually his. No one would suggest, for example, that between 1941 and 1945, the United States was not engaged in a conflict against the Japanese Empire, even though that conflict between two singular nations was part of a larger conflict with several parties on each side. By the same token, when a plaintiff files a civil action against his employer in court, it is undoubtedly a lawsuit "he" brought against "the company," even though he is entitled to maintain his lawsuit as a class action if it meets the criteria of Federal Rule of Civil Procedure 23. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Likewise, a class arbitration here would be an arbitration of Mr. Varela's claims against Lamps Plus.

Moreover, the language Lamps Plus cherry-picks must be read together with other language in the

agreement calling more broadly for arbitration of "all disputes, claims or controversies" that "relat[e] to ... the employment relationship between the parties," Pet. App. 24a, with no limitation to claims of the singular employee signing the agreement. Similarly, the key language providing for arbitration "in lieu of any and all lawsuits or other civil legal proceedings relating to my employment" lacks the purportedly limiting language on which Lamps Plus relies. A class proceeding involving the data breach at issue would without question involve "disputes, claims or controversies" as well as "civil legal proceedings" that would "relat[e]" to Mr. Varela's employment (as well as to that of other members of the class). It would also involve claims that would be "available to the parties by law," *id.* at 25a, and lead to "remed[ies] allowed by applicable law," *id.* at 26a. Lamps Plus's contention that the agreement's language is inherently limited to bilateral proceedings does not account for these provisions.

4. Lamps Plus's argument that the procedural provisions of the agreement bolster its exclusively-bilateral interpretation is equally unconvincing. That argument rests principally on a provision establishing a default rule of one fact deposition per side, which Lamps Plus views as inconsistent with class proceedings. Leaving aside that the provision is also inconsistent with even purely bilateral pursuit of most of the kinds of claims listed in the arbitration agreement ("claims for discrimination or harassment based on race, sex, sexual orientation, religion, national origin, age, marital status, or medical condition or disability," *id.* at 25a), Lamps Plus ignores that the agreement expressly permits an arbitrator to grant leave for more discovery on a showing of substantial need, *id.* at 32a. An

arbitrator would undoubtedly recognize such need in a case determined to be appropriate for class proceedings.

Lamps Plus's further argument that the procedural provisions' references to "either party," *id.*, contemplate bilateral arbitration overlooks that as a formal matter, class members are not *named* parties, *see Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). In a case with a single class representative and a single defendant, it is quite natural to refer to "either party."

Most importantly, Lamps Plus's invocation of the procedures called for in the agreement overlooks the elephant in the room: the agreement's incorporation of the AAA and JAMS rules, which authorize consideration of requests that an arbitration be maintained on a class basis. In determining whether a reasonable lay person could think the agreement provided for class arbitration, the minor provisions it mentions pale in significance beside the one it ignores.

5. Lamps Plus's assertion that California intermediate appellate court authority supports its view that the opinions below do not reflect "neutral application of ordinary state-law contract principles," Pet. Br. 19–20, is also unavailing. Lamps Plus cites two decisions, *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198 (Cal. Ct. App. 2012), and *Kinecta Alternative Financial Solutions, Inc. v. Superior Court*, 140 Cal. Rptr. 3d 347 (Cal. Ct. App. 2012), *disapproved of on other grounds*, *Sandquist*, 376 P.3d at 523 n.9.[11]

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[11] Both *Nelsen* and *Kinecta* were decided before the California Supreme Court ruled in *Sandquist* that, under California procedural law, California state courts should leave the determination whether an arbitration agreement authorizes class arbitration to

(*Footnote continued*)

Neither decision calls into doubt the lower courts' application of California law principles in this case.

In both cases, the courts found that the *only* relevant language in the arbitration provisions at issue limited those agreements to individual claims between the employee and employer. *See Nelsen*, 144 Cal. Rptr. 3d at 211 ("All of the relevant contractual language ... contemplates a two-party arbitration. No language evinces an intent to allow class arbitration."); *Kinecta*, 140 Cal. Rptr. 3d at 356. Neither decision addresses language similar to the provisions that the lower courts relied on in this case as indicia of intent to permit class proceedings; conversely, nothing in the lower courts' opinion here suggests that they would have found an intent to permit class arbitration based only on the language addressed by *Nelsen* and *Kinecta*. The decisions thus do not suggest that the lower courts in this case deviated from neutral application of California contract law.

To the extent the cases Lamps Plus cites have any bearing on this case, they underscore that "[t]he question of whether there is a contractual basis for concluding the parties intended to allow class arbitration must ... be based on state law principles of contract interpretation to the extent they are consistent with the parameters of the FAA as described in *Stolt-Nielsen*." *Nelsen*, 144 Cal. Rptr. 3d at 209. The decisions apply the same principles of California contract law relied on by the lower courts in this case, *see id.* at 209–10, except that, because of the absence of ambiguity in the contracts before them, they do not consider the

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the arbitrator. *Sandquist* disapproved *Kinecta* "to the extent it suggests the availability of class arbitration is always an issue for the court." 376 P.3d at 523 n.9.

principle of construing ambiguities against the drafter. The California Supreme Court's subsequent opinion in *Sandquist* leaves no doubt that that principle is also among the generally applicable California rules of contract construction that apply to arbitration agreements, as well as other contracts. 376 P.3d at 514.

Lamps Plus's citations thus do not establish that the lower courts failed to adhere to California law, but instead that courts may arrive at different results in applying neutral rules of contract construction to contracts with different language. More than that, they show that California contract-law principles do not "covertly" discriminate against arbitration, *Kindred*, 136 S. Ct. at 1426, by stacking the deck in favor of findings that parties agreed to class arbitration. Application of those principles has elsewhere resulted in findings that parties did not agree to class arbitration where an agreement provided no support for class arbitration, and will undoubtedly continue to do so in those circumstances.

V. Both Lamps Plus's policy arguments and its waived request that the Court require a heightened standard of clarity for agreements to class arbitration are unavailing.

A. Lamps Plus did not preserve an argument for a "clear and unmistakable" standard.

Evidently not trusting that ordinary principles of contract construction will support the result it seeks, Lamps Plus includes in its brief a belated plea for adoption of a rule that class arbitration is permissible only if a contract "clearly and unmistakably" authorizes it. The issue is not properly before this Court because

Lamps Plus did not argue for such a rule below and the lower courts did not consider the question. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."). Moreover, the argument was not advanced in the petition for certiorari, which focused exclusively on whether the court of appeals' decision is compatible with *Stolt-Nielsen*'s requirement that class arbitration have a contractual basis. And it is not fairly included in the question presented, which is premised on the supposed absence of any support in the agreement for class arbitration, not on the absence of clear and unmistakable authorization. *See* Pet. i. The new issue that Lamps Plus now addresses "may be '*related* to the one petitione[r] presented, and perhaps *complementary* to the one petitione[r] presented,' but [it is] not 'fairly included therein.'" *Wood v. Allen*, 558 U.S. 290, 304 (2010) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992)).

B. Lamps Plus's policy arguments for a stricter standard are unconvincing.

Lamps Plus has in any event failed to justify adoption of the standard it seeks. Although Lamps Plus invokes a number of policies that it claims support a more stringent approach to determining whether parties have agreed to class arbitration, *see* Pet. Br. 23–27, it overlooks that the very basis of *Stolt-Nielsen* was that the question whether an agreement allows arbitrators to consider certifying a class should not be decided on policy grounds, but instead depends on the "contractual rights and expectations" of the parties. *See* 559 U.S. at 682. Indeed, if Lamps Plus were correct, then the Court should have held in *Oxford Health* that the arbitrator had exceeded his authority under

the FAA by applying tools of contractual construction to resolve ambiguity rather than applying a per se requirement that an agreement forecloses class arbitration if it does not clearly and unmistakably authorize it. In the face of this Court's precedents, Lamps Plus identifies no reason to believe that ordinary tools of contract construction are not best suited to the task of determining the parties' intentions regarding class arbitration, "as with any other contract." *Stolt-Nielsen*, 559 U.S. at 682.

Lamps Plus contends that applying standard contract law makes it "'trivially easy' for courts 'to undermine the [FAA],'" Pet. Br. 23 (quoting *Kindred*, 137 S. Ct. at 1428), by interpreting "garden-variety arbitration agreements ... to permit class arbitration," *id.* That contention ignores that the lower courts' construction of the agreement in this case rests not on "garden-variety" features, but on specific language, which Lamps Plus largely ignores, differentiating it from other arbitration agreements. And Lamps Plus points to no evidence that application of standard contract-interpretation principles by courts has led to widespread evasion of the FAA; indeed, it points to no other case in which a court has construed a contract to allow class arbitration.

Lamps Plus also asserts that applying normal contract-law principles to determine whether an agreement authorizes class arbitration creates due process concerns. But those concerns do not arise from the determination that an agreement permits an arbitrator to consider class arbitration; they relate instead to the questions whether an arbitrator should certify a class, what procedural protections apply to class arbitration, and what effect a class arbitration award or settlement

has. However serious those questions may be, this case involves only the antecedent question whether the parties have agreed to allow an arbitrator to address them. Under the FAA, that question is one of contractual intent, as *Stolt-Nielsen* held.

Moreover, Lamps Plus's "due process" objections are unsupported by any real-world examples of unfairness, even though class arbitration has existed at least since this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and courts and arbitrators have been operating within the *Stolt-Nielsen* framework for nearly a decade. Abandoning the contractual approach to the question should have a firmer justification. Lamps Plus's argument also proves too much: It suggests that *no* degree of clarity in an agreement between two parties should allow class arbitration—a position not even Lamps Plus advocates.

Lamps Plus's suggestion that the Court should rest its decision on the view that class proceedings do not benefit employees is equally unwarranted. Such considerations might be pertinent if the decision below rested on a "policy preference for class actions," as Lamps Plus speculates. Pet. Br. 25. The lower courts' decisions, however, rested on *Stolt-Nielsen*'s contractual approach, which already incorporates this Court's conclusion that the meaning of the agreement, not policy preferences, governs.

The "evidence" that Lamps Plus adduces is in any event irrelevant to the class arbitration. Lamps Plus claims that "studies have shown that employees who arbitrate their claims are more likely to prevail than those who go to court." Pet. Br. 26. That point has nothing to do with this case, which is not about whether Mr. Varela will arbitrate his claims or go to

court, but about what form arbitration will take. Lamps Plus cites no comparisons of outcomes of class and individual arbitrations. And even taken on their own terms, Lamps Plus's citations are unpersuasive: Analyses of broader datasets than those available at the time of the dated studies Lamps Plus cites have shown that employees who arbitrate are less likely to win, likely to receive smaller awards, and face a disadvantage because of the repeat-player effect that benefits employers who appear frequently before the same arbitration tribunals.[12]

Wherever the truth lies, uncritical acceptance of arguments that individual arbitration is better for employees should not figure into any decision in this case. Lamps Plus's dubious empirical assertions have nothing to do with what this Court has held to be the dispositive question: The meaning of the parties' contract.

C. Lamps Plus's new theory that class arbitration is an issue of "arbitrability" does not support its position.

Finally, Lamps Plus asserts that the Court should adopt its newly proposed "clear and unmistakable" standard because the potential availability of class arbitration is a "gateway" issue of "arbitrability" similar to those that this Court has held are "for judicial decision" unless the parties "clearly and unmistakably provide otherwise." Pet. Br. 28 (quoting *Howsam v. Dean*

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[12] *See* Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 Indus. & Lab. Rel. Rev. 1019 (2015); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71 (2014); Alexander J.S. Colvin, *An Empirical Study of Arbitration: Case Outcomes and Processes*, 8 J. Empir. Legal Stud. 1 (2011).

Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)). Even if the Court were to overlook Lamps Plus's waiver of this argument, it is difficult to see how invoking *Howsam* supports its position. First, Lamps Plus *received* a judicial determination on the issue. Therefore, even if its position that class arbitration is a matter of arbitrability were correct, it has already had the benefit of the principle it invokes. Second, if the Court were to entertain Lamps Plus's new argument that whether an agreement permits class arbitration is a matter of arbitrability requiring a clear and unmistakable contractual basis, it would logically also have to consider that the delegation clause in the parties' agreement provides that issues of arbitrability are for the *arbitrator*. Lamps Plus cannot have its cake and eat it, too: If the Court entertains an issue Lamps Plus waived, it must also take up matters "predicate to an intelligent resolution" of that issue. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996). Doing so would require the conclusion that Lamps Plus agreed to let the arbitrator decide whether class arbitration is permitted, foreclosing its plea for an order compelling arbitration only of individual claims.

In any event, Lamps Plus is wrong to assert that the considerations that call for a "clear and unmistakable" standard for the question of who decides matters of arbitrability are applicable to decisions about whether an agreement is properly interpreted to allow class arbitration. The decision whether to compel arbitration is made against a statutory backdrop that permits a court to compel arbitration only on finding that the parties entered into a valid agreement to arbitrate a particular subject. *See* 9 U.S.C. §§ 2, 4; *Mitsubishi*, 473 U.S. 625–26; *First Options*, 514 U.S. at 945; *Rent-A-Center*, 561 U.S. at 71. In light of that statutory

structure, an agreement to allow arbitrators to decide questions of arbitrability runs so counter to the presumed expectations of *all* parties to an agreement that the Court adopted the unusual clear-and-unmistakable standard to protect the reasonable expectations of the parties. *See First Options*, 514 U.S. at 945.

At the same time, the Court stressed that the norm is that interpretation of arbitration agreements remains governed by "ordinary state-law principles." *Id.* at 944. *Stolt-Nielsen* likewise concluded that "contractual rights and expectations" should govern the class arbitration question. 559 U.S. at 682. Particularly in a setting where the reasonable expectations of the parties may differ, replacement of a contract-law based standard with one that places a heavy thumb on the scales in favor of the party that has typically dictated the terms of the agreement is unwarranted. There is no reason to believe that ordinary contract-law principles are not up to the task of resolving disputes about the meaning of agreements about class arbitration—especially when the drafter always has the ability to make the parties' mutual intentions clear by incorporating an explicit prohibition on class proceedings. *See Dish Network*, 2018 WL 3978537 at *15 (Tymkovich, C.J., concurring) (citing *Epic Sys.*, 138 S. Ct. at 1632; *Concepcion*, 563 U.S. at 352).

CONCLUSION

This Court should either vacate the court of appeals' opinion and dismiss Lamps Plus's appeal or affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

1. Section 16 of the Federal Arbitration Act, 9 U.S.C. § 16, provides:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

2. 28 U.S.C. § 1254 provides in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ....

3. 28 U.S.C. § 1291 provides in pertinent part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ....

4. Cal. Civ. Code § 1635 provides:

All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code."

5. Cal. Civ. Code § 1636 provides:

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

6. Cal. Civ. Code § 1638 provides:

The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

7. Cal. Civ. Code § 1644 provides:

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless

a special meaning is given to them by usage, in which case the latter must be followed.

8. Cal. Civ. Code § 1649 provides:

If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

9. Cal. Civ. Code § 1654 provides:

In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who cause the uncertainty to exist.

No. 17-988

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS[1]

Varela focuses little attention on the question presented: whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

No doubt recognizing the weakness of his position on that issue, Varela's brief instead advances a litany of reasons why the Court should not decide the question—arguments that he asserted in unsuccessfully opposing certiorari. The Court should reject those arguments again.

First, Varela contends that the Ninth Circuit lacked appellate jurisdiction. The respondent in *Stolt-Nielsen* tried a similar tack to block this Court's consideration of the merits, and this Court found no "clear justification for now embracing an argument '[the Court] necessarily considered and rejected' in granting certiorari.'" 559 U.S. 662, 670 n.2 (2010).

And Varela's argument is plainly wrong. By both requiring class arbitration and dismissing Varela's claims in favor of arbitration, the district court's order constitutes a "'final decision with respect to an arbitration'" subject to "immediate appeal" under Section 16(a)(3) of the FAA. This Court held just that in *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 86-87 (2000). But even if the district court's order were not a dismissal, it effectively denied Lamps Plus's motion to compel *individual* arbitration—instead agreeing with *Varela*'s contention, over

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[1] The Rule 29.6 Statement in the opening brief remains accurate.

Lamps Plus's strenuous objection, that the agreement authorized class-wide arbitration. It therefore was appealable under 9 U.S.C. § 16(a)(1)(B).

Second, Varela maintains that whether the parties authorized class arbitration is a "state-law question of contract construction." Resp. Br. 36. But *Stolt-Nielsen* holds that "[w]hile the interpretation of an arbitration agreement is *generally* a matter of state law, the *FAA* imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" 559 U.S. at 681 (emphasis added). That is a federal law standard.

Third, "the FAA requires" that the agreement must show that the parties affirmatively "*agreed to authorize*" class arbitration. *Id.* at 687 (emphasis in original).

Here, the agreement says nothing about class arbitration and contains language making clear that the only claims that may be asserted are the parties' own claims. The Ninth Circuit's contrary conclusion and Varela's arguments rest entirely on language that is standard in numerous arbitration agreements and would turn *Stolt-Nielsen* on its head by making class arbitration the norm whenever an agreement fails to disavow it.

The Court should reverse the decision below.

ARGUMENT

I. Varela's Renewed Jurisdictional Argument Is Meritless.

Varela renews his contention—not raised below but rather asserted for the first time at the petition stage—that the Ninth Circuit lacked appellate juris-

diction. Resp. Br. 9-16; compare Br. in Opp. 20-24. That argument is wrong.

The respondent in *Stolt-Nielsen* advanced a similar argument, asserting for the first time at the petition stage, and again at the merits stage, that the lower federal courts lacked jurisdiction to review the arbitral panel's clause construction award because the case was not yet ripe for review. See *Stolt-Nielsen* Br. in Opp., 2009 WL 1339235, at *23-29 (May 11, 2009); *Stolt-Nielsen* Resp. Br., 2009 WL 3404244, at *52-59 (Oct. 20, 2009).

The Court rejected that argument, "disagree[ing]" with the jurisdictional argument on the merits and observing that there was no "clear justification for now embracing an argument '[the Court] necessarily considered and rejected' in granting certiorari.'" 559 U.S. at 670 n.2 (quoting *United States* v. *Williams*, 504 U.S. 36, 40 (1992)).

The same outcome is warranted here. The district court's single order terminating this case had two components: (1) it compelled a *class-wide* arbitration over Lamps Plus's objections, notwithstanding Lamps Plus's repeated requests for an order compelling individual arbitration; and (2) it dismissed all of Varela's claims in favor of that class arbitration. Pet. App. 20a-22a, 23a.

Varela's effort to manufacture a jurisdictional barrier depends completely on a sleight-of-hand: separating the two components of this single order and treating them as if they were entirely unrelated. Specifically, he appears to concede that the dismissal is final, but he argues that the dismissal is not adverse to Lamps Plus. Resp. Br. 12-16. Then, he appears to recognize that the order compelling class ar-

bitration is adverse to Lamps Plus, but he argues that it is a non-final order "directing arbitration to proceed." *Id.* at 10 (quoting 9 U.S.C. § 16(b)(2)).

When the two elements of the district court's order are considered together—as this Court did in *Randolph*—Varela's argument fails.

1. The statutory text, and this Court's application of that provision in *Randolph*, confirm that the district court's dismissal renders the *entire* order a "'final decision with respect to an arbitration'" that is immediately appealable. 531 U.S. at 85 (quoting 9 U.S.C. § 16(a)(3)). The dismissal is a decision made "with respect to an arbitration" (9 U.S.C. § 16(a)(3))—that is, the portion of the order dismissing the claims is inextricably tied to the portion of the order compelling arbitration.

Randolph, which used the singular terms "order" and "decision," confirms that link: "The District Court's order directed that arbitration proceed and dismissed respondent's claims for relief. The question before us, then is whether *that order* can be appealed as 'a final decision with respect to an arbitration.'" 531 U.S. at 85 (emphasis added). And "where, as here, the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, *that decision* is final within the meaning of § 16(a)(3), and therefore appealable." *Id.* at 89 (emphasis added).[2]

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[2] Varela notes that the dismissal here was without prejudice, but recognizes (Resp. Br. 13 n.2) that every court of appeals to consider the issue has held that a dismissal without prejudice in favor of arbitration is a final, appealable order under *Randolph*. See Pet. Br. 30 & n.7. Rather than challenge those decisions, he principally contends that "[e]ven assuming the dismis-

Varela argues that an appeal is not available because the district court's dismissal of his claims was "favorable" to Lamps Plus (*e.g.*, Resp. Br. 14-16)—in other words, he claims that Lamps Plus lacks standing to appeal. But the order did not just dismiss the action, it also compelled a class-wide arbitration that Lamps Plus never requested and actively argued *against*. Pet. Br. 30; ER48-51, 159-161. That plainly harmed Lamps Plus.

Varela points to *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017), but that case is readily distinguishable. This Court held in *Baker* that a plaintiff cannot *himself* voluntarily dismiss his claims following an adverse class certification decision in order to circumvent Rule 23(f)'s "careful calibration" for interlocutory review of such orders. *Id.* at 1714. And *Keena* v. *Groupon, Inc.*, 886 F.3d 360, 363-65 (4th Cir. 2018) (cited at Resp. Br. 15) followed *Baker* in rejecting a plaintiff's attempted manufacture of appellate jurisdiction over an order granting an unappealable *stay* in favor of arbitration (9 U.S.C. § 16(b)(1)) by voluntarily dismissing her own claims.

Here, by contrast, the district court's dismissal does not represent a party's end-run around the requirements for interlocutory appeals, but rather fits *within* the category of orders—"a final decision with respect to an arbitration"—for which Congress expressly "preserve[d] [an] immediate appeal." *Randolph*, 531 U.S. at 86.

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sal is nominally final," it was "a favorable decision" for Lamps Plus (Resp. Br. 13-15). As discussed below, that contention cannot be squared with the fact that Lamps Plus *resisted* class-wide arbitration.

Finally, Varela and an *amicus* suggest that the district court may have lacked authority under the FAA to enter a dismissal rather than a stay. Resp. Br. 16; AAJ Br. 3-14. But they concede that the circumstances here are no different than in *Randolph*, where "[t]he question whether the District Court should have taken that course [was] not before" this Court (531 U.S. at 87 n.2) "because no party has sought to overturn the dismissal order on appeal." Resp. Br. 16; see AAJ Br. 10 & n.6. The *amicus*'s further suggestion that the Court in *Randolph* did not consider the jurisdictional consequences of the district court's authority to enter a dismissal (AAJ Br. 10 n.6) is belied by the Court's express recognition that "[h]ad the district court entered a stay rather than a dismissal in this case, that order would not have been appealable." *Randolph*, 531 U.S. at 87 n.2. In other words, this Court, fully aware of the consequences for appellate jurisdiction that follow from the distinction between a dismissal and a stay, held that a dismissal is a final appealable order. The same approach is warranted here.

2. The court of appeals' jurisdiction also rests on a second, independent ground. The district court's order effectively denied Lamps Plus's motion, thereby authorizing an appeal under Section 16(a)(1)(B) of the FAA, which provides for appeals of an order "denying a petition under section 4 of this title to order arbitration to proceed."

Lamps Plus asked for "an order directing that * * * arbitration proceed *in the manner provided for in such agreement*"—and expressly contended in its arbitration motion that the "manner provided for" was "arbitration on an individual basis." 9 U.S.C. § 4 (emphasis added); ER 144, 159-161.

Varela opposed that motion, contending instead that "the arbitration provision is broad enough to encompass class actions in arbitration" and urged the court to resolve "any ambiguities" against Lamps Plus. ER124. The district court rejected the relief sought in Lamps Plus's motion, instead accepting Varela's "conten[tion] that, if his individual claims are subject to arbitration, so are the class claims." Pet. App. 21a. The Ninth Circuit similarly noted that the district court "accept[ed] the construction posited by Varela—that the ambiguous Agreement permits class arbitration." Pet. App. 4a-5a.

Under these circumstances, Varela's contentions that the district court "provided precisely the relief that Lamps Plus sought" and that Lamps Plus had received a "favorable decision" (Resp. Br. 13, 14) is simply false. Instead, the district court's order, both in substance and effect, refused to grant the relief that Lamps Plus sought—an order compelling *individual* arbitration.

Varela asserts that reaching the merits here will "create a gigantic loophole in section 16(b)(2)" and result in a flood of appeals "over the proper forum and location, the proper arbitrator, and the proper arbitration procedures." Resp. Br. 10, 12. But an order compelling class arbitration over a party's objection is fundamentally different from an order resolving disputes over the location of the arbitration and other minor procedural issues. This Court has explained that, because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental," imposing class-wide arbitration is different in kind from a determination of "merely what 'procedural mode' is available to present [a party's] claims." *Stolt-Nielsen*, 559 U.S. at

687. Rather, it transforms the arbitration into a proceeding that "is not arbitration as envisioned by the FAA" and "lacks its benefits." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 351 (2011); Pet. Br. 10-13. Under the FAA, "one of arbitration's *fundamental* attributes" is its "individualized nature." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018).

More generally, this Court has recognized that class procedures are transformative and impose "the risk of 'in terrorem' settlements." *Concepcion*, 563 U.S. at 350; see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (Ginsburg, J., dissenting).

That settlement pressure is multiplied exponentially in the arbitration context because of the extremely limited grounds for challenging an arbitral award. See *Concepcion*, 563 U.S. at 351. Requiring a defendant to litigate a class arbitration before it is able to challenge a district court's decision to order class arbitration will as a practical reality insulate that decision from review.

The cases Varela cites (Resp. Br. 11-12) only reinforce this distinction. None of them involved an order imposing class arbitration on a defendant over its objection; most involved different locations or forums for an individual arbitration. See Pet. Reply 5 n.4 (discussing cases). Lamps Plus was entitled to appeal the district court's adverse order imposing a class arbitration that Lamps Plus never sought and actively opposed.

II. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

A. Determining Whether An Arbitration Agreement Authorizes Class Arbitration Requires Application Of Both Federal Law And State Law Standards.

Varela also seeks to avoid the question presented by asserting that the decision below rests entirely on state law and that there is no federal-law question for this Court to address—another argument advanced in his brief in opposition (at 7-11). See Resp. Br. 17-37. In essence, his argument is: (1) so long as a court frames its decision as an application of state contract interpretation principles—rather than its own policy views—that interpretation gives each party all that "it was entitled to under the FAA" (Resp. Br. 35); and (2) if the court misconstrues the agreement, that "add[s] up only to a claim of error on the state-law side of the equation" (*id.* at 36) and therefore does not present a federal question. That argument is wrong: The FAA imposes significant constraints on the application of state law.

1. The Court has recognized in a variety of contexts that, although state law generally governs the interpretation of an arbitration agreement, the FAA imposes interpretive rules that constrain state law.

For example, the FAA imposes a rule that parties must clearly and unmistakably agree to depart from the presumption that gateway questions of arbitrability are for a court to decide, to avoid "forc[ing] unwilling parties to arbitrate a matter" contrary to their expectations. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995). Moreover, the "liberal federal policy favoring arbitration

agreements" means that the "[FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitral issues should be construed in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

For similar reasons, the FAA supplements state contract law by requiring an affirmative agreement to class arbitration to ensure that the parties intended "the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 686. Because "the relative benefits of class-action arbitration are much less assured," there is "reason to doubt the parties' mutual consent to" abandon individualized arbitration and instead "resolve disputes through class-wide arbitration." *Id.* at 685-86 (citing *First Options*, 514 U.S. at 945).

Like the holdings in *First Options* and *Moses H. Cone*, *Stolt-Nielsen*'s holding that the "FAA requires more"—a "contractual basis" for concluding that the parties agreed to authorize class arbitration (*id.* at 687)—is a statement of substantive federal law. Indeed, the Court made that clear by stating it was specifying "the rule to be applied in deciding whether class arbitration is permitted." *Id.* at 680-81. Whether the agreement satisfies that affirmative federal requirement does not turn solely on state law: federal law requires that the agreement affirmatively manifest the parties' consent to class arbitration.

Varela's approach would allow the FAA's "rules of fundamental importance" (*id.* at 682) to be satisfied by formalistic recitals. Varela would declare con-

clusive a court's labeling of its decision as an "interpretation of the contract"; in his view, the FAA would have no further role to play. Resp. Br. 35-36.

But "merely saying something is so does not make it so." *Stolt-Nielsen*, 559 U.S. at 675 n.7. And Varela's approach would make it "trivially easy" for courts "to undermine the Act." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1428 (2017). If Varela were correct, all a court would need to do to immunize its reading from the FAA's preemptive force—no matter how untenable that reading—is invoke state-law rules governing contract interpretation.

Varela points to *Concepcion* to justify his approach—stating that the Court held "that the FAA required enforcement of agreements prohibiting class arbitration as well as agreements allowing it" (Resp. Br. 23). In his view, that means the FAA is agnostic as to the difference between individual and classwide arbitration. But this Court has repeatedly held otherwise, explaining that class arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 563 U.S. at 351; see also *Epic Sys.*, 138 S. Ct. at 1623 ("*Concepcion*'s essential insight" is that courts may not "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent").

Varela's reliance on *Oxford Health* is equally misplaced. He concedes that the Court's decision rested on the "limits [on] judicial review" of an *arbitrator*'s decision (see 9 U.S.C. § 10(a)) and that those limits are "not present in this case." Resp. Br. 24. His assertion that the decision is "highly instructive as to

the limits of the FAA's commands concerning class arbitration" (*ibid.*) therefore makes no sense.

Indeed, this Court rejected Oxford Health's argument that the parties' arbitration clause "lack[ed] any of the terms or features that would indicate an agreement to use class procedures * * * because, *and only because*, it is not properly addressed to a court" under Section 10(a)(4). 569 U.S. at 572 (emphasis added). Justice Alito's concurrence similarly observed that "[i]f we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate.'" *Id.* at 574 (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685).

In short, *Oxford Health*'s *arbitrator*-specific holding does not apply to a *court's* interpretation of an arbitration agreement. Instead, this Court reviews *de novo* the federal question whether the Ninth Circuit's interpretation is consistent with the FAA's requirement of an affirmative indication in the arbitration agreement of the parties' consent to class arbitration.

2. Varela also has no answer to *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015), in which this Court squarely rejected the lower court's protestations of neutrality in interpreting the phrase "law of your state" in a consumer contract. This Court explained that although "California courts are the ultimate authority on [California] law," it was for this Court to decide whether "that state law is consistent with the [FAA]." *Id.* at 468.

So too here. Varela acknowledges *Imburgia*'s holding that "a purported application of even neutral state-law contract principles to an arbitration agreement" must still comport with the FAA. Resp. Br. 37. He nonetheless contends that *Imburgia*'s reach is limited to an interpretation that is "so lacking in justification that it does not truly reflect generally applicable contract law." *Ibid.* But that supposed limitation offers no help to Varela because it aptly describes the decision below rather than distinguishing it. See Pet. Br. 10-27; pages 13-21, *infra*. The panel majority crafted a "unique" interpretation of the Agreement fashioned to impose class arbitration rather than the default—bilateral arbitration. *Imburgia*, 136 S. Ct. at 469.

B. The Ninth Circuit's Inference Of An Agreement To Authorize Class Arbitration Lacks Any Contractual Basis.

When Varela finally turns to the merits, he largely repeats the errors made by the Ninth Circuit panel majority. There is not a word in the Agreement that demonstrates an intention to authorize class-wide arbitration. Varela also has no persuasive response to the language throughout the agreement affirmatively demonstrating that the parties contemplated bilateral arbitration instead.

Accordingly, the decision below flunks the FAA's "contractual basis" requirement articulated by *Stolt-Nielsen*. And it certainly does not satisfy the "clear and unmistakable" standard that, as we discuss, should govern the inquiry here.

1. Varela has no persuasive response to the Agreement's text clearly contemplating bilateral arbitration.

To begin with, Varela has no meaningful answer to the multiple portions of the Agreement's text demonstrating the parties' intent to engage in traditional, bilateral arbitration.

For example, Varela does not deny that the Agreement limits the claims subject to arbitration to "claims or controversies" that "*I* may have against the Company * * * or that the Company * * * may have against *me*" "aris[ing] in connection with *my* employment, or any of the parties' rights and obligations arising under *this Agreement*." Pet. App. 24a-25a (emphasis added).

He maintains, with no support, that this language "does not exclude the possibility that the arbitration may encompass claims that [Varela] could assert on an aggregate basis together with those that are exclusively and individually his." Resp. Br. 44. But that assertion makes no sense, because the class device cannot transform the claims of *other* employees regarding *their* employment into *Varela*'s claims regarding *his* employment. See Opening Br. 17. And Varela elides the Agreement's terms "claims or controversies" with the wholly different term "lawsuit" in asserting that "when a plaintiff files a civil action against his employer in court, it is undoubtedly a lawsuit 'he' brought against 'the company.'" Resp. Br. 44. Varela enters Alice in Wonderland territory in analyzing the Agreement's language providing that "any and all disputes, claims or controversies arising out of or relating to this Agreement [or] the employment relationship between the parties" will be subject to arbitration (Pet. App. 24a). Varela asserts

that this language contains "no limitation to claims of the singular employee signing the agreement" (Resp. Br. 45), but that reading is not plausible. "Parties" in that context plainly refers to the two parties to the Agreement—Lamps Plus and Varela—and states nothing more than their mutual obligation to arbitrate claims that one might have against the other, not to arbitrate claims of other employees. Moreover, the Agreement separately contains a straightforward "singular limitation" in the language calling for the employee to arbitrate claims or controversies "that *I* may have against the Company." Pet. App. 24a (emphasis added).

Finally, Varela's only response to the Agreement's repeated use of "either party"—a term suggesting bilateral arbitration—is to protest that absent class members are not named parties. Resp. Br. 46. But if Varela's argument were correct, that would lead to the absurd result that the parties did not intend to permit "traditional joinder" of the claims of a few employees into a single proceeding, but did intend to permit class actions, which are a "species" of joinder. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010).

2. The contract provisions relied upon by the Ninth Circuit do not reflect consent to class arbitration.

Varela relies heavily on language providing that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to *my* employment." Pet. App. 24a (emphasis added). But that phrase merely states that the employee agrees to arbitrate in place of going to court, which is one of "the primary characteristic[s] of an arbitration agreement"—namely, "a waiver of the right to go to court

and to receive a jury trial." *Kindred*, 137 S. Ct. at 1427. The language does not state and does not mean that the arbitration will duplicate the procedures available in court.

Moreover, language stating the obvious proposition that arbitration is a substitute for court proceedings—commonly included in arbitration agreements to ensure that the parties are aware that they are giving up the right to proceed in court—cannot support an inference that the parties agreed to jettison the "fundamental attributes of arbitration," including "*streamlined* proceedings." *Concepcion*, 563 U.S. at 344 (emphasis added).

The Agreement's language calling for arbitration of "all disputes, claims or controversies" related to the parties' employment relationship describes the substantive coverage of the arbitration agreement. Varela does not dispute that a class action is a procedural device, not a substantive dispute or claim. Resp. Br. 39-40. He instead tries to stretch this language—which appears routinely in arbitration clauses—to "include[] disputes and controversies that have classwide dimensions." *Id.* at 39.

But that interpretation is not plausible—particularly given the language, a few sentences later, specifying that the covered "claims" and "controversies" are those that "*I* may have against the Company * * * or that the Company may have against *me*." Pet. App. 24a (emphasis added). No one thinks, for example, that if two parties release all "claims, disputes, and controversies" they have against each other (*ibid.*), they have also released the claims of other persons.

Varela similarly errs in arguing that a court could infer consent to class arbitration from the Agreement's list of substantive disputes covered by arbitration, because some of those types of disputes, such as claims for discrimination, may be "pursued on behalf of a class" in court. Resp. Br. 40. Again, that language does not address what procedures are available in arbitration—it reflects nothing more than the parties' agreement "to submit their disputes to an arbitrator," which is *not* enough. *Stolt-Nielsen*, 559 U.S. at 685.

Moreover, Varela ignores that multiple California appellate courts confronted with similarly worded arbitration provisions have rejected the arguments he advances here. Opening Br. 19-20 (citing *Nelsen* v. *Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115 (2012); *Kinecta Alternative Fin. Solutions, Inc.* v. *Super. Ct.*, 205 Cal.App.4th 506, 511 n.1 (2012). For example, as the *Nelsen* court put it, "[a] class action by its very nature is not a dispute 'between [Nelsen] and Legacy Partners.' * * * [I]t would be a dispute between LPI and numerous individuals, one of whom is Nelsen." 207 Cal.App.4th at 1129-30.

Varela contends that *Nelsen* and *Kinecta* involved "different language" (Resp. Br. 48), but he is unable to identify any material differences.[3] Those decisions represent contrary "California case law" that "clarifies any doubt about how to interpret the language" (*Imburgia*, 136 S. Ct. at 469)—they are yet

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[3] Indeed, Varela conceded below that "the language in the *Kinecta* and *Nels[e]n* agreements are very similar to Lamps Plus's Agreement." Ninth Cir. Ans. Br. 44.

another indication that the panel majority's purported interpretation cannot stand.

Varela also gets no mileage out of the language authorizing the arbitrator to "award any remedy allowed by applicable law." Pet. App. 26a. Varela's reliance (Resp. Br. 40 n.8) on *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 n.7 (1995) is perplexing—that case stands for the common-sense proposition that language calling for arbitration of "'all disputes' and 'any remedy or relief'" means what it says, empowering the arbitrator to decide "any dispute that would otherwise be settled in a court" and to "award the same forms of damages or relief." But a class action is neither a "dispute" nor a "remedy" (unlike the request for punitive damages in *Mastrobuono*).

Varela concedes as much, but then argues that "class-wide remedies can only be awarded if the procedural device of a class action is available." Resp. Br. 40. That is circular bootstrapping—it assumes with no support in the Agreement that standard language permitting the arbitrator to award the same forms of relief that a court could award includes class-wide relief. And it proves far too much, because that language is found in virtually all arbitration agreements, as well as the arbitral rules of major providers.[4]

3. The additional provisions Varela relies upon do not authorize class arbitration.

Varela also cites two additional provisions in the Agreement not relied upon by either of the lower

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[4] See, *e.g.*, American Arbitration Association (AAA) Employment R. 39(d); JAMS Employment R. 24(c).

courts: (1) the agreement's incorporation of the employment arbitration rules of the AAA and JAMS; and (2) the provision giving the arbitrator "'exclusive authority to resolve any dispute relating to the interpretation, applicability, enforcement or formation of this Agreement.'" Resp. Br. 41-43 (quoting Pet. App. 30a).

These provisions do not help Varela.

First, Varela acknowledges that the AAA and JAMS employment arbitration rules incorporated into the agreement say nothing about class arbitration. Rather, he claims that those employment rules are supplemented by the existence of AAA's and JAMS's class arbitration rules.

But those supplemental class arbitration rules expressly provide that they shall *not* be read to provide a basis for inferring an agreement to classwide arbitration. Resp. Br. 42 n.10. Varela's argument that a court can interpret those rules to mean the exact opposite of what they forbid an arbitrator from doing—inferring an agreement to authorize classwide arbitration—is nonsensical.

Varela's reliance on the incorporation of standard arbitral rules also proves far too much. If choosing the rules of either of the two most popular arbitration providers constitutes consent to authorize class arbitration, then virtually every arbitration clause that does not explicitly foreclose class-wide arbitration would instead allow it—a result that would turn *Stolt-Nielsen* on its head and defy its admonition that class arbitration may not be "infer[red] solely from the fact of the parties' agreement to arbitrate." 559 U.S. at 685.

Second, the clause providing the arbitrator with exclusive authority to resolve disputes about the interpretation of the Agreement is a red herring. Neither party invoked that clause in the lower courts, and the parties agreed to have the courts determine whether the Agreement authorizes class arbitration (as well as to decide issues about the Agreement's scope and enforceability). See, *e.g.*, ER114, ER159-161. That clause also has no bearing on whether the Agreement authorizes class-wide arbitration—otherwise every arbitration agreement delegating these issues to the arbitrator could be held to authorize class arbitration unless it expressly states otherwise, a result that—again—is completely inconsistent with *Stolt-Nielsen*.

4. The state-law contra proferentem *doctrine cannot supply the requisite contractual basis for consent to class arbitration.*

Finally, Varela argues that the state-law *contra proferentem* doctrine is a rule of general applicability that allows courts to infer party agreement to class arbitration notwithstanding the FAA. Resp. Br. 30-35.

But for all of the reasons explained above and in our opening brief, the Agreement was not ambiguous—a pre-condition under state law for applying the *contra proferentem* doctrine. *Waller* v. *Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18-19 (1995) (ambiguity requires two or more "reasonable" constructions of a contract term, and courts may "not strain to create an ambiguity where none exists"). Nor is the Court required to accept the lower court's invocation of ambiguity: In *Imburgia*, this Court flatly rejected the state court's conclusion that the contract was ambiguous because the professed ambiguity required a de-

parture from the language's "ordinary meaning" and was "unique" to arbitration. 136 S. Ct. at 469.

And even if the arbitration agreement were "ambiguous" as to authorization of class arbitration—and even if the panel had invoked the *contra proferentem* doctrine in a neutral way—the panel's interpretation would have to give way to the FAA. That is because even a nominally neutral state-law doctrine cannot manufacture the consent to class arbitration that the "FAA requires" as a matter of federal law in order to displace the FAA's preference for bilateral arbitration. *Stolt-Nielsen*, 559 U.S. at 687; see also *Concepcion*, 563 U.S. at 348; Opening Br. 21-23.

In support of the *contra proferentem* argument, Varela relies on *Mastrobuono* (Resp. Br. 33-34), but never acknowledges—much less rebuts—our explanation that the Court was applying the strong federal policy *favoring* arbitration, and that the state-law canon provided *further* support for the arbitrability of the request for punitive damages at issue. Opening Br. 22. Indeed, Varela all but ignores the strong federal policy in favor of arbitration that this Court has repeatedly recognized in decisions spanning over three decades. *Ibid.* (citing *Moses H. Cone*, 460 U.S. at 24-25). He briefly suggests (Resp. Br. 31 n.7) that the pro-arbitration presumption prevails only when the agreement's scope is at issue, but the same rationale calls for applying the presumption in favor of compelling the type of arbitration "envisioned by the FAA," rather than using a state-law interpretive tie-breaker to impose a form of arbitration that—in the absence of party agreement—is inconsistent with the FAA. *Concepcion*, 563 U.S. at 351.

C. An Arbitration Agreement Should Not Be Construed To Authorize Class Procedures Unless The Text Clearly And Unmistakably Does So.

For all of the reasons above, the decision below amounts to a "palpable evasion of *Stolt-Nielsen*" and *Concepcion* (Pet. App. 5a), by inferring an agreement to class arbitration from a contract that contains no basis for such an inference. Reversal is therefore compelled by this Court's precedents.

Lamps Plus additionally has argued that "*[i]f the Court* * * * decides to address the question left open in *Stolt-Nielsen*"—how strong of a contractual basis is required for an agreement to authorize class arbitration—then the Court should hold that the FAA requires the same clear and unmistakable textual authorization that it requires in other contexts to depart from the FAA's default rules. Opening Br. 27-29 (emphasis added).

Varela protests that this Court cannot give further guidance on what the FAA requires, because this argument was not raised below or briefed at the petition stage. Resp. Br. 48-49. But this Court has provided guidance on an important question of federal law without it having been raised in the lower courts, explaining that it is "well-positioned to provide further guidance" on the contours of a statutory standard where "[t]he parties have had every opportunity to address the nature of the * * * standard" before this Court, even though it was not passed upon below. *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1927 n.4 (2017). The same is true here.

Moreover, identifying precisely how strong a contractual basis the FAA requires for an agreement to

authorize class arbitration is fairly encompassed in the question presented, which asks whether the FAA preempts a state-law interpretation that would authorize class arbitration based solely on general language commonly used in arbitration agreements. See *Daimler AG* v. *Bauman*, 571 U.S. 117, 136 n.16 (2014) (addressing an issue "fairly encompasse[d]" in the question presented, although it was raised solely by *amici* in the lower court); see also generally Stern & Gressman, Supreme Court Practice 458-60 (10th ed. 2013).

Varela's objections to the clear and unmistakable standard on the merits are unpersuasive.

First, Varela worries that a "clear and unmistakable" standard places too "heavy [a] thumb on the scales" in favor of bilateral arbitration. Resp. Br. 54. But the FAA emphatically does protect bilateral arbitration. See CWC Br. 17-22; Chamber Br. 3-13. And because "the relative benefits of class-action arbitration are much less assured," requiring a clear and unmistakable textual basis for consent to class arbitration is entirely consistent with *Stolt-Nielsen*'s admonition that courts or arbitrators should have "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." 559 U.S. at 685-86. It also *furthers*, not displaces, the aim of ensuring that an agreement to class arbitration reflects "the parties' intentions" (Resp. Br. 50), and harmonizes it with the FAA's policy favoring individual arbitration. See RLC Br. 6-11.

Second, Varela misconstrues our position as asking this Court to decide whether the availability of class arbitration is a "gateway" issue of "arbitrability." Resp. Br. 52-53. In fact, that issue is not presented here, just as it was not presented in

Stolt-Nielsen or *Oxford Health*. Opening Br. 28 n.6. Rather, our point is simply that—just as this Court has required a clear and unmistakable expression of intent to depart from the default rule that courts decide issues of arbitrability—so too should it require clear and unmistakable agreement to depart from traditional, bilateral arbitration.

Third, Varela is wrong in contending the due process concerns identified in Justice Alito's concurrence in *Oxford Health* are absent here. Varela suggests that they arise only once an arbitrator actually certifies a class or issues a class-wide award. Resp. Br. 50-51. But the point is that the due process concerns created by class arbitration are yet another reason why the FAA favors bilateral arbitration, and why it is appropriate to require clear and unmistakable evidence of the parties' consent to abandon that default procedure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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LAMPS PLUS, INC., ET AL.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF THE RESPONDENT

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Other authorities

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice, formerly known as the Association of Trial Lawyers of America, was established in 1946 to safeguard victims' rights, strengthen the civil-justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar.

AAJ files this brief for two reasons. First, we highlight a threshold question under the Federal Arbitration Act: whether the district court had authority to dismiss the case after referring the respondent's claims to arbitration. Although the parties have given it little attention, the issue bears on this Court's jurisdiction in this case, has deeply split the courts of appeals, and has profound effects on parties' ability to obtain appellate review of orders compelling arbitration. Second, this brief explains how the extreme view of the Federal Arbitration Act urged by Lamps Plus would, if adopted by this Court, upset decades of settled expectations about the proper interpretation of arbitration agreements under state law.

Based on its members' expertise in both arbitration and class action litigation—and its organizational concern for the development of the law on those issues—AAJ is well positioned to offer a unique perspective on these questions.

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[1] No party's counsel authored any part of this brief, and no party or party's counsel contributed money intended to fund its preparation or submission. All parties have provided written consent to the brief's filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief highlights a threshold question of jurisdiction separate from the jurisdictional issue discussed in the parties' briefs: whether the Federal Arbitration Act gave the district court below authority to dismiss the case after referring Varela's claims to arbitration. That question implicates important policy issues under the FAA, including the statute's potentially conflicting goals of allowing parties to obtain review of erroneous arbitration orders and of ensuring quick and easy enforcement of arbitration agreements.

Section 3 of the FAA provides that a district court, when referring a plaintiff's claims for arbitration, "shall ... *stay*" the case pending the conclusion of that arbitration. 9 U.S.C. § 3 (emphasis added). Several courts of appeals have interpreted that language as *requiring* a district court to stay a case after referring it to arbitration. But other courts, including the Ninth Circuit, have held that a district court in appropriate circumstances has discretion to instead *dismiss* the case. The difference matters for purposes of appellate jurisdiction: Under § 16 of the FAA, an order compelling arbitration and staying the case is not immediately appealable, but an order compelling arbitration and dismissing the action is.

Resolution of the question whether the district court had authority to dismiss the case is necessary to determine this Court's jurisdiction. If the district court lacked that authority, its decision to enter an unauthorized dismissal could not have converted what would otherwise have been an unappealable interlocutory decision into an appealable final one. And if the court of appeals lacked jurisdiction to review the district court's arbitration order, this Court would likewise lack jurisdiction to review the decision of the court of appeals.

Nevertheless, the parties did not brief the question below, and the panel's opinion does not address it. Nor do the parties' briefs in this Court directly address the issue. Rather than wading into important and delicate issues of law and policy under the FAA without the benefit of briefing, the Court may wish to dismiss the writ as improvidently granted and instead follow its customary practice of awaiting a case in which the issue has been properly presented and decided and is fully addressed in the parties' briefs in this Court.

Assuming, however, that the Court decides to resolve the question presented, it should affirm the court of appeals' decision. In deciding that the parties' arbitration agreement permits class arbitration, the court did exactly what this Court has repeatedly instructed it and other lower courts to do: It looked to the language of the agreement in light of ordinary state-law contracts principles. Lamps Plus's argument that the Court should disregard California's venerable rule requiring contracts to be construed against the drafter would risk usurping the states' previously unquestioned authority to interpret their own laws—an authority fundamental to our federal system—in favor of a new, federalized law of contracts. This Court should decline to start down that dangerous path.

ARGUMENT

I. This Court cannot decide the question presented without first deciding whether it has jurisdiction.

A. Every federal court "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

This Court accordingly has an "obligation to notice defects in a court of appeals' subject-matter jurisdiction." *Id.* at 541. The Court is required to address such issues that come to its attention, whether or not the issues were raised by the parties or passed on by the courts below. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990).

The discussion of jurisdiction in the parties' briefs focuses on the question whether the district court's decision to compel arbitration was appealable given the FAA's prohibition on interlocutory appeals of orders compelling arbitration. But the parties have not addressed a distinct question bearing on the jurisdiction of the court of appeals below: whether the district court had authority under the FAA to turn its interlocutory arbitration decision into an appealable final one by dismissing the case after referral to arbitration.[2]

Section 3 of the FAA provides that, when referring claims for arbitration, a district court "shall on application of one of the parties *stay*" the case pending the arbitration's conclusion. 9 U.S.C. § 3 (emphasis added). Whether, in appropriate circumstances, § 3 also authorizes district courts to *dismiss* a case is a question that has evenly divided the courts of appeals. *See Katz*, 794 F.3d at 345. The Second, Third, Seventh, Tenth, and Eleventh Circuits hold that the FAA authorizes district courts only to stay the case, not to dismiss it. The First, Fifth, Sixth, and Ninth Circuits, on the other hand, have

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[2] Varela's brief does note the holding of some courts that a dismissal of arbitral claims is improper, but does not link that issue with the question of appellate jurisdiction over the district court's order compelling arbitration. Resp. Br. 16. (citing *Katz v. Celico P'ship*, 794 F.3d 341, 344–47 (2d Cir. 2015)).

held that, at least after referring all of a plaintiff's claims to arbitration, a district court has discretion to dismiss the case. *See* Alessandra Rose Johnson, *Oh, Won't You Stay with Me?: Determining Whether § 3 of the FAA Requires A Stay in Light of Katz v. Cellco Partnership*, 84 Fordham L. Rev. 2261 (2016) (discussing the circuit split).[3]

Resolution of the question is critical to the jurisdiction of the court of appeals below. As courts of limited jurisdiction, the courts of appeals have "only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress." *Bender*, 475 U.S. at 541. Congress delineated the authority of the courts of appeals to review orders compelling arbitration in § 16 of the FAA. *See* 9 U.S.C. § 16(a)(3), (b). Assuming that § 3 authorizes the district court to dismiss the case after referring it to arbitration, § 16 would provide a court of appeals with jurisdiction over the arbitration order as a "final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3); *see Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 87 n.2 (2000). If, however, § 3 requires the district court to instead enter a stay, the arbitration order would be interlocutory and unappealable. *See* 9 U.S.C. § 16(b) ("[A]n appeal may not be taken from an interlocutory order ... granting a stay of any action under section 3 of this title ... .").

If the district court lacked authority to enter a dismissal, the fact that it nevertheless purported to dismiss the case would not affect appealability. As this Court

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[3] The Fourth Circuit has identified competing panel decisions on the question, which it has thus far declined to reconcile. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012).

recently held, an order that is properly interlocutory is not converted to an appealable final order any time a district court is persuaded to "issue an order purporting to end the litigation." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017). If it were otherwise, district courts would have discretion to freely bypass § 16's strict limits on appellate jurisdiction just by designating their orders as dismissals. *Cf. id.* (rejecting the finality of a voluntary dismissal that would have "severely undermined" the appellate rules).

B. Those circuits that have held that § 3 of the FAA requires district courts to stay a case rather than dismiss it have relied primarily on the section's plain language. Although recognizing the advantage of dismissals to a district court's ability to manage its docket, these courts nevertheless hold that § 3's language stating that a district court "shall" stay proceedings makes the stay mandatory. *See Katz*, 794 F.3d at 345.[4]

The courts holding dismissals to be improper have also expressed concern that to allow such orders would be inconsistent with the structure of § 16. Subsections (a)(1) and (a)(2) of that section are designed to "permit immediate appeal of orders hostile to arbitration"—*i.e.*, orders preventing arbitration from proceeding or denying a stay pending arbitration. *Katz*, 794 F.3d at 346. Subsection 16(b), on the other hand, is designed to "*bar[]* appeal of interlocutory orders *favorable* to arbitration"—*i.e.*, orders *requiring* arbitration to

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[4] *See also Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005); *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 269 (3d Cir. 2004); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992).

proceed or *granting* a stay. *Id.* (emphasis added). But if a district court could dismiss a case after referring it to arbitration, it could convert an order favorable to arbitration—like an order compelling arbitration—into a "final decision with respect to an arbitration" that is immediately appealable under 9 U.S.C. § 16(a)(3). District courts could thus choose to permit immediate appeals of orders *favorable* to arbitration, which would conflict with § 16's pro-arbitration scheme.

Allowing a district court to use a dismissal to create an appealable order would also, according to these courts, contradict "the FAA's underlying policy 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Id.* at 346 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). Section 16's limits to judicial review are designed to "maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). But the ability of district courts to create immediately appealable orders compelling arbitration would inevitably "provok[e] additional litigation" in the courts of appeals that would have to be resolved before the ordered arbitration could proceed. *Katz*, 794 F.3d at 343, 346. Parties seeking arbitration would thus "be deprived of an important benefit which the FAA intended [them] to have—the right to proceed with arbitration without the substantial delay arising from an appeal." *Lloyd*, 369 F.3d at 270–71.

In contrast to those decisions, the district court below relied on Ninth Circuit precedent in holding that a dismissal was proper. Pet. App. 23a (citing *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988)). In *Sparling*, the Ninth Circuit held that, although § 3

"gives a court *authority* ... to grant a stay pending arbitration," it "does not preclude" dismissal in cases where a district court has referred *all* of a plaintiff's claims to arbitration, leaving the court nothing more to decide. 864 F.2d at 638 (emphasis added).[5]

Although courts following the Ninth Circuit's approach acknowledge that § 3's language "seems to direct that the action 'shall' be stayed pending completion of arbitration," they hold that dismissals are permissible "notwithstanding [that] language." *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1073–74 (9th Cir. 2014); *see also Fedmet Corp.*, 194 F.3d at 678 (holding that, although "the express terms of § 3" require a stay, that language "was not intended to limit dismissal of a case in the proper circumstances."). These courts have not always been clear about the textual basis for that conclusion. As one commentator has explained, however, the only stay that § 3's plain language appears to require is a stay of "the trial of the action." Richard A. Bales & Melanie A. Goff, *An Analysis of an Order to Compel Arbitration: To Dismiss or Stay?*, 115 Penn St. L. Rev. 539, 542 (2011). Thus, "[t]here is no clear prohibition in the FAA against dismissing claims when there is nothing left for the court to consider, *e.g.*, when there is nothing left to make a 'trial of the action.'" *Id.* at 543.

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[5] *See also Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 372 (1st Cir. 2011) ("Where one side is entitled to arbitration of a claim brought in court, in this circuit a district court can, in its discretion, choose to dismiss the law suit, if all claims asserted in the case are found arbitrable."); *Green v. Ameritech Corp.*, 200 F.3d 967, 973 (6th Cir. 2000); *Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674, 678 (5th Cir. 1999) (same).

Courts adopting this approach recognize that it would "serve no purpose" for a district court to stay a case, and thus retain jurisdiction, once all of a plaintiff's claims have been referred to arbitration. *Fedmet Corp.*, 194 F.3d at 678. Dismissal in those circumstances can not only "prevent a waste of judicial resources," but also reduce the potential for judicial interference in pending arbitrations and thus advance "the independence of the arbitral forum." Bales & Goff, *An Analysis of an Order to Compel Arbitration*, 115 Penn St. L. Rev. at 560.

Moreover, these courts recognize that prohibiting district courts from entering dismissals would in many cases leave arbitration orders effectively unreviewable. *Id.* at 556–57. Plaintiffs, for example, would be prevented from appealing an order compelling arbitration until the arbitration is complete, even if the basis for their appeal would have been that the arbitration agreement makes arbitration effectively impossible by forbidding the assertion of certain rights or by imposing impracticable fees. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013). Permitting a district court to dismiss gives the court a tool to address that problem. When a case raises a "genuine legal question concerning arbitrability," a dismissal order "allow[s] that question to be determined promptly on appeal." *ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091, 1101 (6th Cir. 2002). When, on the other hand, there is "little legal dispute," the court "can speed along [the] arbitration" by "staying the action rather than dismissing it." *Id.*

C. The question of whether the FAA authorized the district court's dismissal below determines whether the court of appeals had jurisdiction over the appeal of the court's arbitration order. If a district court has authority to dismiss a case after referral to arbitration, the order

would be appealable as a "final decision with respect to an arbitration" under 9 U.S.C. § 16(a)(3). If, however, the district court under the FAA lacked authority to enter an appealable dismissal, the parties could not have evaded that limitation simply by persuading the district court to issue the order anyway.[6]

That is the principle established by this Court's recent decision in *Microsoft v. Baker*, 137 S. Ct. 1702. The plaintiffs in *Baker* sought to appeal a district court order denying certification of a class. *Id.* at 1706–07. Under Federal Rule of Appellate Procedure 23(f), plaintiffs can ordinarily bring such an appeal only with the court of appeals' permission. But the plaintiffs in *Baker*, who had been denied permission to appeal, tried to circumvent that denial by stipulating to a voluntarily dismissal of their claims. *Id.* The voluntary dismissal, they argued, was an appealable "final decision" under 28 U.S.C. § 1291. *Id.* And in their appeal of that order, they would be free to also seek review of the order denying class certification.

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[6] This Court's holding in *Randolph* that an order dismissing a case in favor of arbitration was appealable under § 16(3) does not suggest otherwise. 531 U.S. 79. *Randolph* left undecided the question whether the district court's dismissal was proper under the FAA or whether the court should have instead entered a stay. *Id.* at 86–87 & 87 n.2. Because the parties in *Randolph* did not argue, and this Court did not consider, the effect of an unauthorized dismissal on appellate jurisdiction, the case is not precedential on that question. *See Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[T]he existence of unaddressed jurisdictional defects has no precedential effect."). "[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it]." *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974).

This Court rejected the plaintiffs' attempt to manufacture appellate jurisdiction in that way. Plaintiffs, the Court held, "cannot transform a tentative interlocutory order into a final judgment ... simply by dismissing their claims with prejudice." *Id.* at 1705. To permit such a tactic would be to "undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." *Id.* at 1707. Section 1291's final-judgment rule, the Court concluded, "is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation." *Id.* at 1715.

The same principle controls here. Section 16(a)(3) of the FAA, like § 1291, creates appellate jurisdiction only over "final decisions." Despite that jurisdictional limit, Lamps Plus, like the plaintiffs in *Baker*, seeks review of an *interlocutory* order that the statutory scheme expressly deems unappealable. *See* 9 U.S.C. § 16(b)(2)–(3) (prohibiting appeals of interlocutory orders compelling arbitration or directing it to proceed). As in *Baker*, Lamps Plus seeks to obtain appellate review despite that statutory bar by "transform[ing]" the interlocutory order into a final decision. 137 S. Ct. at 1715. And it seeks to do so based on a district court order "purporting to end the litigation"—an order that Lamps Plus itself "persuade[d] [the] district court to issue." *Id.* *Baker* compels the conclusion that Lamps Plus cannot, with this simple expedient, subvert the statutory appellate-jurisdiction scheme that Congress wrote into the FAA.[7]

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[7] *See also Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.7 (1990) ("The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a

To be clear, our point is only that an improper dismissal under the FAA cannot create appellate discretion to review an *order compelling arbitration*, for which the FAA would otherwise have precluded appellate review. *See Baker*, 137 S. Ct. at 1712 (holding that the courts of appeals lacked jurisdiction under § 1291 "*to review an order denying class certification* ... after the named plaintiffs have voluntarily dismissed their claims with prejudice" (emphasis added)). That is not to say that the courts of appeals would necessarily also lack jurisdiction in proper cases to review the propriety of the *dismissal order* itself, which—whether or not the district court had authority to grant it—is ordinarily an appealable final decision under § 1291. Otherwise, parties genuinely aggrieved by the improper dismissal of their claims would have no means to challenge that disposition on appeal. Here, however, Lamps Plus "sought review of only the inherently interlocutory order" compelling arbitration. *Baker*, 137 S. Ct. at 1715. It "did not complain of the 'final' order that dismissed the case," and a reversal of that order would not relieve it of any injury. *Id.* The logic of *Baker* prohibits the company from relying on a dismissal designed to manufacture jurisdiction over an otherwise unappealable order.

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district court labeled a nonappealable interlocutory order as a 'final judgment.'"); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 741–42 (1976) (holding that a district court's "recital" that order was a "final judgment" could not make an interlocutory order immediately appealable). *Cf. Moses H. Cone*, 460 U.S. at 933 n.8 (rejecting the "artificiality of resting appealability on an otherwise substanceless distinction between stays and dismissal"); *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949) (holding that the label attached to dismissal order does not affect appealability).

To allow such a ploy to succeed would invite endless manipulation of appellate jurisdiction under the FAA. Indeed, circuits holding that the FAA allows dismissals after referral to arbitration view the resulting discretion of district courts to create or destroy appellate jurisdiction as a feature of their approach. *See Arthur Treacher's, Inc.*, 280 F.3d at 1101 (describing the resulting "case-management advantage"). And parties have seized on that discretion as a means of obtaining a litigation advantage by persuading district courts to allow or prevent interlocutory appeals. As one litigator advised: "[A]n early tactical decision on whether to seek a stay or a dismissal will either enable or hinder an adversary's ability to appeal immediately." Stephen H. McClain, *Moving in Style*, L.A. Law., June 2001, at 39.[8]

D. Accordingly, the question of whether the court of appeals had jurisdiction to review the district court's order compelling arbitration turns on whether the FAA authorized the court to render that order appealable by dismissing the case. And if the court of appeals lacked jurisdiction to review the arbitration order, this Court likewise lacks jurisdiction to review it: This Court's certiorari jurisdiction is limited to cases properly "in" the court of appeals, 28 U.S.C. § 1254, and it thus has no authority to decide issues that fall outside the scope of the lower courts' appellate jurisdiction.

This Court therefore cannot decide the case without first addressing the threshold question of the district

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[8] *See also, e.g.*, Donald J. Querio, *So, You Won Your Arbitration Motion And Thought You Were Done—Think Again!*, Summer 2017, *available at* https://perma.cc/LHY4-S5DB ("Whether an order compelling arbitration is ripe for appeal will depend on whether the district court can be convinced to enter [a dismissal].").

court's authority to dismiss the case—a question that was not passed on by the court of appeals or addressed by the parties either in this Court or below. This Court does not generally decide issues not argued or decided below, especially where the issue has not been briefed in this Court. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016). To avoid the need to decide that uncertain question without the benefit of briefs by the parties, the Court may wish to dismiss the writ as improvidently granted. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (dismissing writ).

II. The court of appeals correctly interpreted the arbitration agreement under California law.

In the event that this Court reaches the merits of the question presented, it should affirm the court of appeals' decision that the agreement at issue here authorizes class arbitration. And regardless of what result the Court reaches, it should tread carefully in addressing Lamps Plus's invitation to interpret the agreement without reference to California law. To do so would not only conflict with this Court's well-established precedents requiring arbitration agreements to be interpreted in light of state contract law, but would call into question the core principles of federalism on which those precedents are based.

A. The court of appeals' holding that the arbitration agreement in this case authorizes class arbitration was a straightforward application of this Court's precedents under the FAA. First, the court correctly identified what this Court has held to be the key question in cases like this one: "whether the parties *agreed to authorize* class arbitration." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*

Corp., 559 U.S. 662, 687 (2010). That is precisely the question that the court of appeals sought to answer.

Moreover, the court went about answering that question in precisely the way this Court has repeatedly held that a court should. The court began its analysis by "construl[ing] the contract (focusing, per usual, on its language)." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 571 (2013). It then interpreted that language in light of "ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In California, those state-law principles require that ambiguities be construed against the drafter, especially in a case involving a contract of adhesion. *See Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016). That rule of construction has been recognized by the California Supreme Court as a "familiar maxim of the law" since the earliest years of that court and was codified by the California legislature nearly 150 years. *See Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, 16 (1864); Cal. Civ. Code § 1654 (1872). It is unquestionably the sort of ordinary state-law principle on which a court may properly rely.

Accordingly, the only issue left for this Court to review is the correctness of the court of appeals' conclusion that the particular language of the agreement at issue here is ambiguous on the question of class arbitration. The court based that conclusion in part on its view that the phrase "civil legal proceedings"— which the agreement subjects to arbitration—can easily be read in the context of the agreement to include class proceedings. Pet. App. 3a. The court's holding that California law thus requires that language to be construed against Lamps Plus to permit class arbitration is eminently reasonable.

B. Lamps Plus argues that California's contract law cannot justify the court of appeals' interpretation, relying on this Court's holding in *Stolt-Nielsen* that a class arbitration agreement requires a "contractual basis" beyond "the fact of the parties' agreement to arbitrate." 559 U.S. at 685, 697. But Lamps Plus goes far beyond *Stolt-Nielsen* when it claims that the required "contractual basis" cannot be supplied by contract-interpretation principles under state law. Pet. Br. 18 ("State law rules do not control whether the agreement satisfies that federal principle."). According to Lamps Plus, the result in *Stolt-Nielsen* depended instead on "federal principle[s]" regarding class arbitration that lie beyond the control of state law.

That gets *Stolt-Nielsen* backward. There, this Court held that an arbitral panel erred when, in the face of a stipulation that the parties lacked "any agreement on the issue," the panel nevertheless required class arbitration based only on its own view that "class arbitration is beneficial." *Id.* at 673–74. In so holding, *Stolt-Nielsen* emphatically did not, as Lamps Plus suggests, reject reliance on neutral principles of state contract law in determining whether parties have such an agreement. On the contrary, the Court held that the arbitration panel should have looked to state contract law to supply the missing term. *Id.* at 673 (holding that the panel's "proper task" was to identify whether the relevant contract law "contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent"). *Stolt-Nielsen* thus reaffirmed the principle that interpretation of an arbitration agreement "is generally a matter of state law," not an externally imposed "policy preference." *Id.* at 676, 681.

Since Congress enacted the FAA in 1925, this Court has never read the statute to require courts to ignore neutral principles of state contract law in interpreting arbitration agreements. To adopt that reading now would require this Court to throw out its longstanding precedents holding that the FAA does not displace the states' authority to "regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). And setting aside that established understanding would in turn run up against the core principle of federalism that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975). For those reasons, this Court should decline Lamps Plus's invitation to federalize "the interpretation of private contracts"—"a question of state law, which this Court does not sit to review." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

CONCLUSION

The Court should either dismiss the writ of certiorari as improvidently granted or affirm the judgment of the court of appeals.

Respectfully submitted,

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No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONERS

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OTHER AUTHORITIES

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BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONERS

The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioners before this Court and thus urges reversal of the decision below.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 240 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of the business community's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

CWC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of CWC member companies thus have adopted companywide policies requiring the use of binding, individual arbitration to resolve all employment-related disputes. Those policies primarily are designed to promote relatively prompt, informal resolution of individual disputes, thus avoiding costly, complex, and protracted litigation in state or federal court.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that CWC represents. The Ninth Circuit ruled incorrectly that an agreement to permit classwide arbitration can be inferred from standard language generally describing the types of disputes that two parties agreed to resolve through arbitration rather than in litigation. This Court's decision as to whether the availability of class procedures can be inferred from standard terms that commonly appear in arbitration agreements will have substantial legal and practical impacts on all employers that utilize arbitration as a means of resolving employment disputes.

CWC has participated in numerous cases addressing the enforceability of arbitration agreements. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Lamps Plus maintains a binding arbitration program that is offered to employees as a voluntary term of employment; employees who elect to opt-out are not required to arbitrate their claims. Pet. App. 8a-9a. Frank Varela is employed by Lamps Plus. Pet. App. 8a. At the start of his employment, he signed a standalone arbitration agreement. *Id.* Although he was given an opportunity to do so, Varela did not opt out. Pet. App. 8a-9a.

The arbitration agreement covers:

> [A]ll claims or controversies ("claims"), past, present, or future that I may have against the Company or against its officers, directors, employees or agents ... or that the Company may have against me .... Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement.

Pet. App. 9a.

It also provides that by agreeing to arbitrate, the employee is waiving the right to pursue his or her claims in court:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

Pet. App. 24a. The agreement does not contain an express class action waiver provision.

In 2016, Lamps Plus was the victim of a "phishing" attack that resulted in the release of current and former employee W-2 tax information to an unauthorized third party. Pet. App. 1a. Varela sued Lamps Plus in California federal court on behalf of himself and others similarly situated asserting various claims stemming from the data breach. *Id.* The company

moved to compel individual arbitration based on the agreement Varela had signed at the start of his employment. Pet. App. 1a-2a.

The district court compelled arbitration on a class-wide basis, finding that the agreement's "all claims" language was broad enough to include class and individual claims. Pet. App. 22a. A divided Ninth Circuit panel in an unpublished opinion affirmed, concluding that the following language was sufficiently ambiguous as to authorize class arbitration:

- Waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";
- Waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- Agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

Pet. App. 2a, 24a.

According to the majority, "A reasonable – and perhaps *the most reasonable* – interpretation of this expansive language is that it authorizes class arbitration." Pet. App. 3a. After rehearing was denied, Lamps Plus filed a Petition for Writ of Certiorari, which this Court granted on April 30, 2018. *Lamps Plus, Inc. v. Varela*, 138 S. Ct. 1697 (2018).

SUMMARY OF ARGUMENT

This Court has "often observed that the [Federal] Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms,

including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citation omitted); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties'") (citation omitted). This is because arbitration "is a matter of consent, not coercion." *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989).

In *Stolt-Nielsen*, this Court held that under the FAA, a party to an arbitration agreement cannot be forced to submit to class arbitration procedures "unless there is a contractual basis for concluding that the party *agreed* to do so," 559 U.S. at 684, cautioning arbitrators not to "presume, consistent with their limited powers under the FAA, that the parties' mere silence" is enough to make such a finding. *Id.* at 687 (footnote omitted). And yet, the court below defied this clear command, inferring from a standard arbitration agreement, which nowhere mentioned class procedures, that the parties to it had authorized class arbitration.

Petitioners correctly contend that because a contractual basis must exist in order to conclude that an agreement was reached to arbitrate on a classwide basis, inferring such an agreement from standard contractual terms is at odds with the FAA and this Court's longstanding arbitration jurisprudence. Doing so would require parties to affirmatively waive class arbitration for fear that their silence would be

misconstrued as implied consent to class arbitration, contrary to *Stolt-Nielsen*.

Explicit consent to class arbitration is profoundly important, given the fundamental changes that class procedures impose on traditional bilateral arbitration. Parties, particularly employers, select arbitration over litigation in order to settle disputes relatively quickly and efficiently. Introducing class procedures erases these advantages, while simultaneously limiting one key protection offered by litigation: access to judicial review. Thus, class arbitration offers all of the burdens, and none of the benefits, of class litigation. While parties are free to authorize the use of class procedures in arbitration, such authorization must be explicit. Only such an express agreement can serve as a sufficient contractual basis for concluding that the parties authorized class arbitration.

ARGUMENT

I. THE FAA PRECLUDES COURTS FROM IMPOSING CLASS ARBITRATION ABSENT UNMISTAKABLE INDICIA THAT THE PARTIES INTENDED TO AUTHORIZE SUCH PROCEDURES

The Federal Arbitration Act (FAA) provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed repeatedly, Congress enacted the FAA in "response to hostility of American courts to the enforcement of arbitration agreements, [thus] compel[ling] judicial enforcement of a wide range of written arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct.

1612, 1621 (2018) ("Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable'") (citation omitted). In short, the FAA represents "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), *superseded by statute on other grounds*, Federal Arbitration Act, 9 U.S.C. § 16.

Inexplicably, the court below took standard contract language waiving "any right" to file a lawsuit or demand a trial, and agreeing to arbitrate "in lieu of any and all lawsuits or other civil legal proceedings," and from it concluded that the parties intended to authorize class arbitration despite the agreement's silence as to the availability of such procedures. Pet. App. 2a, 3a. Because the decision below impermissibly conflicts with the plain text of the FAA and is inconsistent with well-established legal principles reiterated time and again by this Court, it must be reversed.

A. The FAA Requires That A Valid Arbitration Agreement Be Enforced As The Parties Actually Wrote It

In enforcing arbitration agreements, courts are not free to substitute their own judgment, but rather must enforce the terms as written. Once a court finds that the parties have agreed to arbitrate under the FAA, it "*shall make* an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*." 9 U.S.C. § 4 (emphasis added). Thus, this Court has "often observed that the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitra-

tion will be conducted.'" *Epic Systems*, 138 S. Ct. at 1621 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties'") (citation omitted); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (noting that the FAA "places arbitration agreements on equal footing with all other contracts"). Indeed, "the FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms," *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 469 (1989), reflecting the notion that arbitration "is a matter of consent, not coercion." *Id.* at 479.

In addition, parties to an arbitration agreement are "generally free to structure their arbitration agreements as they see fit." *Stolt-Nielsen*, 559 U.S. at 683 (citations and internal quotations omitted). Parties are accorded discretion in choosing their own arbitration processes because doing so "allow[s] for efficient, streamlined procedures tailored to the type of dispute." *AT&T Mobility*, 563 U.S. at 344. Even statutory rights generally cannot override an agreement to arbitrate, "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted).

This precept is no less true in the context of arbitration agreements between employee and employer, even when the dispute involves matters of such importance as discrimination. This is because

the Court "has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City Stores*, 532 U.S. at 123; *see also Gilmer*, 500 U.S. at 26 ("'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute'") (citation omitted). In short, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (citations omitted).

Here, the parties consented to bilateral arbitration of employment disputes; Varela was permitted to opt out of arbitration within three days of executing the agreement, but declined to do so, thus indicating his assent to the terms contained in the agreement. The FAA and this Court's precedents leave no alternative but to enforce, as written, this mutual agreement to engage in bilateral arbitration.

B. Where An Arbitration Agreement Is Silent As To The Availability Of Class Arbitration, *Stolt-Nielsen* Bars The Forced Imposition Of Such Procedures Where No Contractual Basis Exists For Doing So

In *Stolt-Nielsen*, this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U.S. at 684; *see also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 565 (2013) ("Class arbitration is a matter of

consent: An arbitrator may employ class procedures only if the parties have authorized them") (citation omitted).

A contractual basis cannot be inferred merely from the agreement to arbitrate itself. As this Court explained in *Stolt-Nielsen*, "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." 559 U.S. at 685. In other words, a court may not conclude that two parties agreed to class arbitration just because they entered into a broad arbitration agreement without any reference to class arbitration.

1. Inferred consent does not constitute a contractual basis for imposing class arbitration

For an arbitration agreement to provide a "contractual basis" for concluding that the parties agreed to permit classwide arbitration, the agreement must affirmatively state the parties' approval of the use of class procedures. Contrary to the lower court's conclusion below, an arbitration agreement without any reference to class procedures does not provide a contractual basis from which it can be concluded that the parties agreed to settle disputes through classwide arbitration.

While *Stolt-Nielsen* does not address directly what constitutes a sufficient "contractual basis" on which to find that the parties to an arbitration agreement effectively – if not explicitly – agreed to the availability of class arbitration procedures, it plainly cautions arbitrators not to "presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their dispute in class

proceedings." 559 U.S. at 687 (footnote omitted). To the contrary, arbitrators must establish that the parties affirmatively "'agree[] to authorize' class arbitration, not merely that they fail to bar such a proceeding." *Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 644 (5th Cir. 2012) (citation omitted), *abrogated on other grounds by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

In *Reed v. Florida Metropolitan University*, for instance, the Fifth Circuit rejected an arbitrator's conclusion that a broadly worded arbitration clause similar to the one at issue here implicitly authorized class arbitration procedures. 681 F.3d at 641. There, the court considered a contract clause stating that "any dispute arising from [the contract], no matter how described, pleaded or styled, shall be resolved by binding arbitration ...." *Id.* Treating the agreement's "any dispute" clause as "a standard provision that may be found, in one form or another, in many arbitration agreements," the court determined that under *Stolt-Nielsen*, more than the mere "*fact of the parties' agreement to arbitrate*" is required to establish a contractual basis for ordering class arbitration. *Id.* at 642. Rather:

> For a court to read additional provisions into [a] contract, the implication must clearly arise from the language used, or be indispensable to effectuate the intent of the parties. It must appear that the implication was so clearly contemplated by the parties that they deem it unnecessary to express it.

Id. at 643 n.10 (citations omitted).

The Sixth Circuit came to the same conclusion when it considered a similarly broad agreement, this one

containing standard language that the parties would resolve "any controversy ... by binding arbitration," and omitting any reference to classwide arbitration. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013). Finding that this standard language merely represented "'the fact of the parties' agreement to arbitrate,'" *id.* at 600 (citation omitted), the court held that *Stolt-Nielsen* precluded an inference that the parties intended to use classwide procedures: "The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it." *Id.* at 599.

In an analogous context, the Fourth Circuit interpreted the term "contractual basis" to mean that an agreement must "unmistakably provide" evidence that the parties consented on a particular point. *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir.), *cert. denied*, 137 S. Ct. 567 (2016). In considering whether two parties had agreed for an arbitrator to decide the availability of class procedures, the Fourth Circuit held that because the arbitration agreement "did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration," *id.*, and in fact said "nothing at all about the subject," *id.*, there was no contractual basis for concluding that they agreed to have an arbitrator decide on the availability of class procedures.

Even prior to *Stolt-Nielsen*, most courts of appeals held that the FAA precludes the imposition of class-based arbitration or consolidation of individual arbitrations where the arbitration agreement itself is silent as to the availability of such procedures. *See, e.g., Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001);

see also Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987), *abrogated on other grounds by Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001). Some went a step further, expressing the logical view that class arbitration categorically is unavailable in the absence of contract language *expressly* authorizing the procedure. In *Champ v. Siegel Trading Co.*, for example, the Seventh Circuit ruled that the FAA prohibits a court from ordering classwide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes ...." 55 F.3d at 271. It determined that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt [] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* at 275 (citation omitted). The Seventh Circuit's insistence on an express provision is both eminently reasonable and in accordance with *Stolt-Nielsen's* requirement that there must be a contractual basis for concluding that the parties to an arbitration agreement agreed to authorize class procedures.

Despite this Court's direct admonition in *Stolt-Nielsen*, the court below took the mere fact of the parties' agreement to arbitrate – as expressed in a broadly worded arbitration agreement composed of standard terms and lacking any reference to class

arbitration – and from it inferred that the parties had agreed to arbitrate on a classwide basis. Rather than interpret the agreement according to its plain meaning, the court made an inference exactly of the type prohibited by *Stolt-Nielsen*, overriding the clear terms of the agreement and failing to adhere to the FAA's requirement to enforce arbitration agreements as they are written.

2. The presence of standard, boilerplate contract terms also is insufficient to establish a contractual basis for class arbitration

Given the far-reaching implications of classwide arbitration, *see infra* pp. 17-22, the bar must be set high for determining that parties have agreed to the use of such procedures. Inferring that parties to an arbitration agreement intended to authorize class procedures simply because they agreed to use arbitration to settle "any controversy" or "any claim" or "any dispute" cannot meet this bar.

a. Arbitration agreements typically contain clauses that are materially indistinguishable from those at issue here

This Court in *Stolt-Nielsen* considered a ubiquitous clause, in use since 1950, which it referred to as "highly standardized." 559 U.S. at 666 n.1, 667. That clause contained language, similar to that at issue here, merely expressing the parties' consent to settle disputes via arbitration:

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a

> merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.*, the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

559 U.S. at 667 (citation omitted). Faced with this commonly used, standard language, this Court declined to infer any authorization of class procedures.

b. Construing such terms as establishing a contractual basis for class arbitration effectively would preclude bilateral arbitration with respect to every agreement that does not contain an express class waiver provision

If inclusion of standard contractual terms were sufficient to infer that two parties authorized class procedures, then any basic agreement to arbitrate – for example, one using boilerplate language to specify who, what, and where to arbitrate – would automatically transform a bilateral agreement into one that authorizes class procedures.

Indeed, it is difficult to imagine an arbitration agreement that would *not* permit such an inference, save those with express class waiver provisions. And yet, the lower court took similarly boilerplate terms – clauses by which the parties waived "any right" to file a lawsuit or demand a trial, Pet App. 3a, 24a, and agreed to arbitrate "in lieu of any and all lawsuits or

other civil legal proceedings," *id.* – and construed those terms to authorize class arbitration.

C. Because Such Procedures Fundamentally Change The Nature Of Arbitration, An Agreement To Allow Class Proceedings Must Be Explicit

Class arbitration differs fundamentally from bilateral arbitration. As this Court has said, "class-action arbitration changes the nature of arbitration," *Stolt-Nielsen*, 559 U.S. at 685, by trading "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness," for slower and costlier procedures that more so resemble traditional litigation. *Epic Systems*, 138 S. Ct. at 1623. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate ..., [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); *AT&T Mobility*, 563 U.S. at 348 ("[S]witch[ing] from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"). In the end, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. So significant is the switch from bilateral to class arbitration that there must be no doubt as to whether the parties intended to authorize its use. Only explicit terms contained in the arbitration agreement can provide this assurance.

Because class arbitration represents a fundamental departure from what the FAA envisioned, this Court has recognized the critical importance of ensuring that

the parties to an arbitration agreement have authorized class procedures. Inferring agreement to classwide arbitration from standard arbitration language that nowhere mentions class proceedings, as the lower court did, turns the agreement on its head, contravening this Court's repeated exhortation to enforce arbitration agreements as they are written. *See, e.g.*, *Epic Systems*, 138 S. Ct. at 1632; *AT&T Mobility*, 563 U.S. at 344. Under the lower court's reasoning – by which any agreement to arbitrate containing standard contractual language would support an inference that the parties authorized classwide arbitration – parties could only avoid class procedures by expressly *disapproving* of them. This would directly undermine *Stolt-Nielsen*'s requirement that an arbitration agreement must contain a contractual basis for concluding that the parties *approved* of class procedures. 559 U.S. at 684.

II. CLASSWIDE ARBITRATION DOES NOT COMPORT WITH THE PRINCIPAL AIM AND PURPOSE OF TRADITIONAL ARBITRATION, NAMELY, SPEEDIER, MORE EFFICIENT DISPUTE RESOLUTION

As an alternative to litigation, arbitration provides the "promise of quicker, more informal, and often cheaper resolutions for everyone involved," *Epic Systems*, 138 S. Ct. at 1621, replacing lengthy and complex court proceedings. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" *AT&T Mobility*, 563 U.S. at 346, by making use of "the traditionally individualized and informal nature of arbitration." *Epic Systems*, 138 S. Ct. at 1623.

In fact, "the relative informality of arbitration is one of the chief reasons that parties select arbitration."

14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009), as it "reduc[es] the cost and increase[es] the speed of dispute resolution." *AT&T Mobility*, 563 U.S. at 345 (citations omitted). Indeed, "[p]arties generally favor arbitration precisely because of the economics of dispute resolution," *14 Penn Plaza*, 556 U.S. at 257, as it provides the "'essential virtue of resolving disputes straightaway.'" *Oxford Health*, 569 U.S. at 568 (citation omitted).

Resolving disputes quickly and inexpensively is "of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores*, 532 U.S. at 123. Thus, many employers have adopted alternative dispute resolution programs with a mandatory arbitration component primarily in an effort to reduce litigation costs and to minimize ill will between the parties to a dispute.

In sum, bilateral arbitration is a crucially important tool for employers, enabling relatively efficient dispute resolution – in exchange for waiving procedures that would otherwise protect them. This includes the opportunity for liberal judicial review. *See AT&T Mobility*, 563 U.S. at 350 (the FAA "allows a court to vacate an arbitral award *only* where the award was procured by corruption, fraud, or undue means") (citation and internal quotation omitted). Typically, then, "[t]he arbitrator's construction holds, however good, bad, or ugly." *Oxford Health*, 569 U.S. at 573.

Class arbitration, on the other hand, offers all of the burdens and none of the benefits of bilateral arbitration. Classwide arbitration "*requires* procedural formality," *AT&T Mobility*, 563 U.S. at 349, while simultaneously "greatly increas[ing] risks to defendants" due to the general unavailability of judicial

review. *Id.* at 350. Thus, the calculus underlying bilateral arbitration agreements – where costly but protective procedures are exchanged for more efficient proceedings – no longer holds, due to the higher risks that attach to matters involving multiple disputants. Commonly, the result of classwide arbitration is that "the risk of an error will often become unacceptable [and, therefore, f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*

Allowing an arbitration to proceed as a class action even where the contract does not clearly allow for it would profoundly undermine the efficiencies of arbitrating workplace disputes. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation ...." *Circuit City Stores*, 532 U.S. at 123. In particular:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 1, 2 (2003).

The financial and other benefits that the parties derive from employment arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration even where the underlying agreement does not provide for class arbitration procedures. In addition to increasing the costs, adjudicating claims on a classwide basis brings a level of complexity that undermines many of the core advantages of arbitration. As this Court noted in *Epic Systems*, if class arbitration were the rule:

> [A]rbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. All of which would take much time and effort, and introduce new risks and costs for both sides. In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

138 S. Ct. at 1623 (citations omitted).

Parties choose arbitration for its efficiency, which is derived in part from the absence of often burdensome litigation procedures. Classwide arbitration reintroduces those very same procedures and inefficiencies, and while parties are free to make this decision, logic

and this Court's precedents dictate that an agreement to do so must be evident on its face. Inferring an agreement to engage in classwide arbitration from standard terms ignores the reasons that parties agree to enter into arbitration in the first place.

CONCLUSION

For the reasons set forth above, the *amicus curiae* Center for Workplace Compliance respectfully submits that the decision below should be reversed.

Respectfully submitted,

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No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., ET AL.,

Petitioners,

v.

FRANK VARELA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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Statutes & Other Authorities:

15 U.S.C. § 2 11

AAA, *Employment Arbitration Rules & Mediation Procedures* (2016) 8, 10

AAA, *Employment Due Process Protocol* (2016) 10

Alicia Bannon, Brennan Ctr. for Justice, *Federal Judicial Vacancies: The Trial Courts* (2013) 7, 8

Am. Bar Ass'n, *The Growing Crisis of Underfunding State Courts* (Mar. 16, 2011) 7

American Arbitration Association, *2016 Annual Report* 6

Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 Ohio St. J. on Disp. Resol. 627 (2008) 9

Cal. Dispute Resolution Inst., *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* (Aug. 2004) 6

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Nat'l Ctr. for State Courts, *Examining the Work of State Courts* (2016) 6

David Lewin, *Dispute Resolution in Non-Union Organizations: Key Empirical Findings*, in Samuel Estreicher, ed., N.Y.U.'s 53rd Annual Conference on Labor (Aspen Publishers 2003).....12

David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005) 5, 12

Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, 108 Penn St. L. Rev. 165 (2003).....8

Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9 (2003) 9

Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777 (2003).....8

Cited Authorities

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G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 786 (2011-2012) 7

H.R. Rep. No. 68-96 (1924).....3, 4

H.R. Rep. No. 97-542 (1982).....4

JAMS, *Policy on Employment Arbitration Minimum Standards of Procedural* Fairness.....11

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 6

Maura Dolan, *Budget Cuts Force California Courts to Delay Trials, Ax Services*, L.A. Times, Apr. 9, 2013.....7

Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56 (2003-04).....10

Nat'l Workrights Inst., Employment Arbitration: What Does the Data Show? (2004).....9, 10

Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267 (2008).....12

Cited Authorities

Page

Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 Cornell J.L. & Pub. Pol'y 477 (2009) 9, 12

S. Rep. No. 68-536 (1924) 4

Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251 (2006).....9

Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89 (2001).....9

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783 (2008) 9

Cited Authorities

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U.S. Courts, *U.S. District Courts—Judicial Business* 2015 6

U.S. Courts, *United States District Courts—National Judicial Caseload Profile* (2018) 6

William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. Times, June 2, 2011 7

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

Amicus thus has a strong interest in the faithful and consistent application of this Court's FAA jurisprudence and, in particular, the FAA's "two goals"—"enforcement of private agreements and encouragement of efficient and speedy dispute resolution." *Dean Witter Reynolds*, 470 U.S. 213, 221 (1985).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus agrees with Petitioners that "[t]he Ninth Circuit's interpretation of the parties' arbitration agreement to authorize class arbitration cannot be squared with the FAA and this Court's precedents interpreting it." Pet. Br. 10. *Amicus* writes separately to highlight the many benefits of arbitration "as envisioned by the FAA" and to explain how the decision below flouts the liberal policy favoring arbitration, deprives employers and employees of the benefits of arbitration, and creates serious due process problems that put employers in an untenable position as defendants.

ARGUMENT

I. The Liberal Federal Policy Favoring Arbitration Reflects the Fact that Arbitration Is a Fair, Efficient, and Inexpensive Alternative to Litigation that Benefits Businesses and Employees Alike.

The FAA "establishes 'a liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). This pro-arbitration policy reflects the fact that arbitration is a faster and cheaper alternative to litigation that is fair and beneficial to businesses and employees. Indeed, both Congress and this Court have recognized the many benefits of arbitration. And the available data confirm that arbitration is cheaper and faster than litigation and produces fair outcomes.

Congress enacted the FAA nearly a century ago "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer*, 500 U.S. at 24. Congress's intended goal was "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924)).

Congress wanted to ensure that contractual arbitration rights are "on equal footing" with all other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), because it recognized the many advantages of arbitration. The House Report accompanying the FAA stated that "the costliness and delays of litigation ... can

be eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R. No. 68-96, at 2. The Senate Report likewise stated that the FAA was needed "to avoid the delay and expense of litigation." S. Rep. No. 68-536, at 3 (1924). Even then, Congress recognized that the expenses and delays associated with litigation tend to increase over time. *See id.* Arbitration thus benefits all disputants—"corporate interests, as well as ... individuals." *Id.*

More than a half-century after the FAA was enacted, Congress had not changed its mind about the "many" benefits of arbitration. H.R. Rep. No. 97-542, at 13 (1982). Indeed, it expounded upon them, emphasizing that arbitration "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Id.* Congress also explained that "arbitration could relieve some of the burdens on the overworked Federal courts." *Id.*

This Court likewise has acknowledged the "real benefits" of arbitration. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). For more than three decades, the Court consistently has enforced the liberal federal policy favoring arbitration, recognizing that the FAA "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *accord Moses H. Cone*, 460 U.S. at 24. And in doing so, the Court repeatedly has highlighted the "advantages" of arbitration. *Allied-Bruce*

Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995); *see, e.g., Concepcion*, 563 U.S. at 345 (arbitration "reduc[es] the cost and increas[es] the speed of dispute resolution"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (arbitration provides "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) (emphasizing the relative "simplicity, informality, and expedition of arbitration").

Moreover, the Court has emphasized that these benefits and advantages are every bit as real in the employment context. *See Circuit City*, 532 U.S. at 123 ("[F]or parties to employment contracts ..., it is true ... that there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."). Indeed, the Court has noted that the relative informality, inexpensiveness, and less adversarial nature of arbitration "may be of particular importance in employment litigation." *Id.* Like Congress, then, the Court has explained that these advantages inure to the benefit of all disputants—including both employers and employees.

Data support what Congress and this Court have recognized. Arbitration is faster than traditional litigation. *See* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572 (2005) ("[F]ew dispute the assertion that arbitration is faster than litigation.").

In March 2018, the median civil lawsuit in federal court took 26.3 months to reach trial. *See* U.S. Courts, *United States District Courts—National Judicial Caseload Profile (2018)*, at 1, https://bit.ly/2NzIssv. State courts, which handle more cases than federal courts, have even worse workloads. *Compare* Nat'l Ctr. for State Courts, *Examining the Work of State Courts* 4 (2016), https://bit.ly/2zDiode (reporting over 15 million new civil cases filed in state court in 2015), *with* U.S. Courts, *U.S. District Courts—Judicial Business 2015*, https://bit.ly/2ul3t29 (reporting 279,036 new civil cases filed in federal court in 2015).

Arbitration, by contrast, is estimated to take "less than half of the time required for civil litigation." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998). For example, a study by the California Dispute Resolution Institute found that consumer and employment disputes were resolved in an average of 104 days in arbitration. Cal. Dispute Resolution Inst., *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* 19 (Aug. 2004), https://bit.ly/2zAmiDL.

A recent AAA study concluded that "U.S. District Court cases took more than 12 months longer to get to trial than cases using arbitration," and that, in states with the highest caseloads (in terms of both AAA arbitration and federal district proceedings), "cases using litigation took 16 months longer on average to get to trial than cases that were being arbitrated." American Arbitration Association, *2016 Annual Report* at 8, https://bit.ly/2ulZvpW.

The increased speed of arbitration is due primarily to its decreased procedural complexity. But it is also attributable to the fact that the courts are clogged. Forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association's Task Force on the Preservation of the Justice System, which was co-chaired by David Boies and Theodore B. Olson. *See* Am. Bar Ass'n, *The Growing Crisis of Underfunding State Courts* (Mar. 16, 2011), https://bit.ly/2ulZH8E; *see also* G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 786, 787 (2011-2012). The effects of these funding cuts have been devastating: in California, "[a]t least 53 courthouses have closed," and "[c]ourts in 20 counties are closed for at least one day a month." Maura Dolan, *Budget Cuts Force California Courts to Delay Trials, Ax Services*, L.A. Times, Apr. 9, 2013, https://lat.ms/2mg9YyV. These and other court closures "have forced some San Bernardino residents to drive up to 175 miles one way to attend to a legal matter." *Id.* In New York City, the wait for a court date is four times longer than it was before the budget cuts. *See* William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. Times, June 2, 2011, https://nyti.ms/2zKO54v.

Although the vast majority of civil claims are filed in state court, the federal courts also have extraordinarily high caseloads, especially at the trial level, where the backlogs are particularly severe. The Brennan Center for Justice has found that "the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007." Alicia Bannon, Brennan Ctr. for Justice, *Federal Judicial Vacancies: The Trial Courts* 5 (2013), https://bit.ly/2L5A4m7. While "[a] judge in 1992 had an average of

388 pending cases on his or her docket," "[b]y 2012, the average caseload had jumped to 464 cases—a 20 percent increase." *Id.*

Arbitral forums do not have comparable backlogs and can resolve disputes rapidly. Moreover, the hundreds of thousands of arbitrations conducted each year reduce the caseloads of state and federal courts, improving their efficiency as well. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, 108 Penn St. L. Rev. 165, 166-67 & n.11 (2003).

Arbitration is also far cheaper than litigation. In general, the AAA charges employees a $200 filing fee and requires businesses to shoulder the rest of the costs. *See* AAA, *Employment Arbitration Rules & Mediation Procedures* 33-34 (2016), https://bit.ly/2KVvJ5C. For many employees, arbitration costs nothing—their filing fees and attorney's fees are shifted to the employer. *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003).

Litigation, by contrast, is much more expensive. The cost of merely initiating civil suit in a federal district court has risen to $400 or more in recent years. *See* Judicial Conference of the U.S., District Courts Miscellaneous Fee Schedule (approving a $50 "administrative" filing fee on top of the previous $350 filing fee), https://bit.ly/2L4081b. In litigation, unrepresented parties have little hope of navigating the complex procedures that apply in court. They must hire a lawyer, whose hourly billing rate far exceeds the cost of proceeding in arbitration

and, in many cases, the entire value of their claim. If the plaintiff retains the lawyer on a contingency basis, the lawyer's compensation substantially reduces the amount of any award. Accordingly, the cost savings of arbitration allow individuals to bring small-value claims that would be priced out of court and larger claims that would be substantially reduced by contingency fees. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 791-92 (2008); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9, 10-11 (2003); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), https://bit.ly/2JiBhSk.

The streamlined procedures of arbitration make it cheaper for businesses too. *See* Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 Ohio St. J. on Disp. Resol. 627, 659 (2008). Businesses often pass these savings on to consumers and employees in the form of lower prices and higher wages. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-56 (2006); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 92 (2001).

Arbitration not only is faster and cheaper than litigation, but it also allows employees to vindicate their claims with at least as much success as litigation. *See* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 Cornell J.L. & Pub. Pol'y 477, 513 (2009). For example, in 2004, the National

Workrights Institute compiled all available employment-arbitration studies and concluded that employees were 19% more likely to win in arbitration than in litigated cases. Nat'l Workrights Inst., *supra*. Median awards received by plaintiffs were the same as in court, although the distorting effect of occasional large jury awards resulted in higher average recoveries in litigation. *Id.* In addition, a study of employment-discrimination suits found that 46% of those who arbitrated won, compared to 34% of those who litigated; that only 4% of litigated cases ever reached trial; and that arbitrations were resolved 36% faster. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56, 56-58 (2003-04).

Arbitration is fair too. Arbitrators and courts ensure that arbitration provisions will be enforced only if they meet basic guarantees of fairness and due process. And companies increasingly have opted to make arbitration provisions even more favorable to employees.

The nation's two leading arbitration service providers, the AAA and JAMS, each have standards to ensure that arbitrations are conducted fairly. The AAA's Employment Due Process Protocol requires independent and impartial arbitrators, reasonable costs, and remedies comparable to those available in court. *See* AAA, *Employment Due Process Protocol*, https://bit.ly/2NQaMXA. The AAA will not administer an employment arbitration unless the arbitration is consistent with the Due Process Protocol. *See* AAA, *Employment Arbitration Rules and Mediation Procedures* 9-10 (2016), https://bit.ly/2KVvJ5C. Likewise, JAMS will not administer a predispute arbitration clause between an employer and a employee unless the

clause complies with "minimum standards of procedural fairness." *See* JAMS, *Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, https://bit.ly/2uf871J. Both AAA and JAMS recognize that independence, due process, and low costs for the consumer are vital elements of a fair and accessible arbitration system.

The courts provide another layer of oversight. State and federal courts are empowered by Congress to invalidate arbitration clauses that run afoul of generally applicable principles of state contract law, such as unconscionability. 15 U.S.C. § 2; *see Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (stating that courts may invalidate arbitration provisions under standards "that are not specific to arbitration"). Courts have not hesitated to strike down arbitration provisions that subject employees to unfair procedures. For example, courts routinely invalidate arbitration provisions that purport to limit a employee's right to recover certain types of damages, *see, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 267 (3d Cir. 2003) (provision barring punitive damages); provisions that impose excessive fees, *see, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir. 2013) (provision requiring employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the employee's claim"); and provisions that unreasonably shorten statutes of limitation, *see, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013) (provision shortening the statute of limitations to 6 months), *aff'd*, 601 F. App'x 461 (9th Cir. 2014).

At the same time, the vast majority of arbitration agreements do not contain these defects. As companies

have gained more experience with arbitration, they have sought to make arbitration even more favorable for employees, not less. *See, e.g.*, Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 Cornell J.L. & Pub. Pol'y 477, 513 (2009).

Reducing the cost and complexity of dispute resolution has an added benefit in the employment context. It makes the process less adversarial and thus more likely to preserve employment relationships. *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999); David Sherwyn et. al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1560 (2005); David Lewin, *Dispute Resolution in Non-Union Organizations: Key Empirical Findings*, in Samuel Estreicher, ed., N.Y.U.'s 53rd Annual Conference on Labor (Aspen Publishers 2003).

Simply put, arbitration provides many benefits to employees. Without arbitration, they would be "far worse off, for they would find it far harder to obtain a lawyer, find the cost of dispute resolution far more expensive, wait far longer to obtain relief and may well never see a day in court." Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267, 267 (2008).

II. The Decision Below Flouts the Federal Policy in Favor of Arbitration, Negates the Advantages of Arbitration for Employers and Employees, and Creates Serious Due Process Problems that Force Defendants into an Untenable Position.

One of the fundamental precepts of the FAA is that "arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *see also Volt*, 489 U.S. at 478-79 (underscoring the congressional goal of "ensuring that private arbitration agreements are enforced according to their terms"). Consistent with that baseline precept, this Court held in *Stolt-Nielsen* that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for doing so." 559 U.S. at 684. Courts and arbitrators thus may not infer "[a]n implicit agreement to authorize class-action arbitration ... solely from the fact of the parties' agreement to arbitrate." *Id.* at 685.

But that is precisely what the lower courts did in this case. Both the district court and the Ninth Circuit panel majority held that class arbitration was required, notwithstanding the fact that there was no contractual basis for doing so. To be sure, the lower courts purported to rely on language within the arbitration agreement. But that contract language did nothing more than replace litigation with arbitration as the parties' agreed-upon mechanism for dispute resolution by waiving the right to go to court and resolve disputes via trial. That is, the relevant contract language did precisely what any garden-variety arbitration agreement does: it waived "the right to go to court and receive a jury trial." *Kindred Nursing*

Ctrs. v. Clark, 137 S. Ct. 1421, 1427 (2017). By twisting this language to provide for class arbitration, the lower courts would "effectively permit[] any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). The lower courts thus flatly contradicted this Court's holding in *Stolt-Nielsen*.

Judge Fernandez (dissenting from the panel majority's decision) thus was right on point in describing the Ninth Circuit panel decision as a "palpable evasion of *Stolt-Nielsen*." Pet. App. 5a. But the decision is even worse than that. By forcing class procedures on the parties, the panel robbed the parties of the many benefits and advantages of arbitration as envisioned by the FAA, thereby running afoul of the "liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339.

As outlined above, the entire point of arbitration is to provide parties with a relatively informal dispute resolution process—one that is speedy, fair, inexpensive, and less adversarial than litigation. But this case has been the opposite. Had this case proceeded promptly to bilateral arbitration it likely would have been resolved within a few months. *See supra* 6 (noting that the California Dispute Resolution Institute found that consumer and employment disputes were resolved in an average of 104 days in arbitration). Instead, this case has already been in court for nearly two-and-a-half years, consuming the time and resources of not only the parties but also the already overburdened federal court system. This costly, drawn-out, highly adversarial process is the exact opposite of what the parties bargained for.

It is no answer to say that the lower courts authorized arbitration (class arbitration, that is) and that Petitioners thus could have avoided litigation by proceeding with class arbitration. Class arbitration is "not arbitration as envisioned by the FAA," *Concepcion*, 563 U.S. at 351, and "lacks its benefits," *id.* at 348. "[S]witch[ing] from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality." 563 U.S. at 348. Indeed, "class arbitration *requires* procedural formality." *Id.* at 349. It thus makes dispute resolution "slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. By shifting to class arbitration, then, the informality, speed, and cost savings of traditional bilateral arbitration are lost. That is precisely why this Court has repeatedly held that requiring classwide arbitration where it is not consensual interferes with the fundamental attributes of arbitration and undermines its prime objectives. *Concepcion*, 563 U.S. at 348.

At the same time, shifting to class arbitration "greatly increases risks to defendants," *id.* at 350—because of the sharply limited judicial review inherent in arbitration. As the Court has noted, "[t]he absence of multilayered review makes it more likely that errors will go uncorrected." *Id.* Parties are willing to accept these errors when "their impact is limited to the size of individual disputes" and "outweighed by savings from avoiding the courts." *Id.* But when faced with the prospect of damages aggregated among thousands of claimants, the risk of error becomes to great to bear. *Id.* ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

Class arbitration thus negates the chief advantages of arbitration and magnifies its disadvantages. It is "not arbitration as envisioned by the FAA." *Id.* at 351. Rather,

it "is a worst-of-both worlds hybrid of arbitration and litigation." Pet. 25. Accordingly, the imposition of class procedures (where it is nonconsensual) flouts the FAA and its federal policy in favor of arbitration.

Perhaps worse still, forcing employers into class arbitration creates serious due process problems. Unlike an Article III court, an arbitrator derives his or her power solely from contract. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 682 ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

For that reason, "[a]n arbitrat[or] may not determine the rights or obligations of non-parties." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003); *see also Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (7th Cir. 1994); *Int'l Brotherhood of Elec. Workers, Local No. 265 v. O.K. Elec. Co.*, 793 F.2d 214, 216 (8th Cir.1986). Accordingly, when absent class members have not been involved in selecting the particular arbitrator who is hearing the dispute or have not affirmatively consented to that arbitrator's authority, those absent class members would have strong grounds to collaterally attack any resulting award as inconsistent with their due process rights. And the strength of those arguments is greatly magnified when, as here, there is no contractual basis for submitting the dispute to class rather than bilateral arbitration.

These due process rights of absent non-parties—including their potential ability to collaterally attack an arbitration award—highlight why an arbitrator cannot bootstrap the named parties' submission to her authority, including her authority to decide the question of class-wide arbitrability, to bind absent nonparties. The res judicata effect of a class arbitration on "class members" other than opt-in claimants is doubtful at best. Under the FAA, "arbitration is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681 (internal quotation omitted). Accordingly, when an arbitration agreement does not clearly authorize class arbitration, the arbitrator's lack of authority over non-parties gives absent non-party class members a strong due-process argument that they could not be bound by any award resulting from an arbitration proceeding in which they did not participate. *See Oxford Health*, 569 U.S. at 574 (Alito, J., concurring) ("With no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute."). This would be true even where the absent class members "signed contracts with arbitration clauses materially identical to those signed by the plaintiff[s] who brought this suit," because "an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination." *Id.*[2]

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2. Notably, the notice and opt-out procedures employed in class-action litigation in court cannot cure this problem. *See Oxford Health*, 569 U.S. at 574 (Alito, J., concurring). "[A]t least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members" who "have not submitted themselves to th[e] arbitrator's authority *in any way*."

Where class arbitration is ordered without the requisite contractual basis, then, it is "vulnerable to collateral attack." *Id.* at 575. Absent class members in such a situation could "unfairly 'claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Id.* (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546-47 (1974)). This heads-I-win, tails-you-lose result is fundamentally "unfair[]" to defendants. *Id.*

CONCLUSION

Amicus curiae respectfully requests that the Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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Id. at 574-75 (second emphasis added). That is because absent non-parties' "silence" as to the arbitrator's authority—*i.e.*, a mere failure to affirmatively opt out—is not the same as the contractual consent required for an arbitrator to have authority over those non-parties. *Id.*

No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,
Petitioners,

v.

FRANK VARELA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONTRACT LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the court of appeals err in interpreting the arbitration agreement in this case, which contained no express term addressing class arbitration, to authorize such proceedings?

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Village of Ilion v. County of Herkimer,
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Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,
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5 Corbin on Contracts § 24.27 (rev. 2018) 13

Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 Yale L.J. 1261 (1980) 14

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are contract law scholars. Their interest is in the sound development of federal law regarding the interpretation and application of the Federal Arbitration Act with due regard to settled principles of state contract law. They submit this brief to clarify for the Court the role of state contract law rules of interpretation in defining the scope and content of parties' contractual agreement.

SUMMARY OF ARGUMENT

I. The Federal Arbitration Act directs courts to enforce arbitration agreements under generally applicable state contract law. That rule requires courts to determine the content of agreements to arbitrate, like any other contract, according to state contract law.

II. That requirement applies with equal force with respect to the interpretation of ambiguous agreements to arbitrate. Accordingly, state contract law supplies rules of contract interpretation to resolve those ambiguities in order to determine the content of the parties' agreement to arbitrate.

III. Universally accepted and widely applicable contract law supports the court of appeals' interpretation of the arbitration agreement in this case. That consensus, which directs courts to interpret an ambiguous

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

contract term against the interest of the drafting party, is accepted by every State, this Court, the leading treatises, and prominent scholarship. Under that interpretative rule, courts sensibly construe ambiguous arbitration clauses to authorize class proceedings.

ARGUMENT

I. STATE CONTRACT LAW GOVERNS THE SCOPE AND CONTENT OF THE PARTIES' AGREEMENT TO ARBITRATE.

The Federal Arbitration Act authorizes the federal courts to issue "an order directing that . . . arbitration proceed *in the manner provided for in [the parties'] agreement*." 9 U.S.C. § 4 (emphasis added). That statutory command reflects Congress's determination that "arbitration is simply a matter of contract between the parties." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). *See also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) ("This text reflects the overarching principle that arbitration is a matter of contract."); *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (arbitration agreements are "a matter of consent, not coercion."). And this Court has recognized that the FAA does not "purport[] to alter background principles of state contract law regarding the scope of [arbitration] agreements." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

Against the background of state contract law, the FAA's "basic purpose" is "to 'ensure judicial

enforcement of privately made agreements to arbitrate.'" *First Options*, 514 U.S. at 945 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)). *See also Volt*, 489 U.S. at 478 (observing that the FAA's "passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'" (quoting *Dean Witter*, 470 U.S. at 220)). The statutory scheme therefore "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (noting that the FAA "place[s] arbitration agreements 'upon the same footing as other contracts.'" (quoting H.R. Rep. No. 68-96 at 1-2 (1924))).

Agreements to arbitrate by class proceedings are, just like any agreement to arbitrate, subject to state contract law. And because arbitration agreements are, like all contracts, founded on the bedrock of consent, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Accordingly, they may "specify by contract the rules under which that arbitration will be conducted." *Id. See also Hall St. Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) ("[T]he FAA lets parties tailor some, even many, features of arbitration by contract, including . . . procedure and choice of substantive law.") (internal citation omitted). Aggregate adjudication of claims is one such procedural choice reserved for the parties: "Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." *Oxford Health Plans LLC v. Sutter*,

569 U.S. 564, 565-66 (2013) (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)).

Because class arbitration procedures are a matter of contract, a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 559 U.S. at 684. Sometimes it is straightforward to determine that the parties had not agreed to class arbitration. In *Stolt-Nielsen*, this Court confronted a contract which the parties stipulated that "no agreement . . . has been reached" on whether the contract authorized class procedures. *Id.* at 669. Faced with a contract that all conceded contained no agreement with respect to class arbitration, this Court held that the arbitral panel erred in ordering such proceedings. The reason the panel erred was that it had usurped the role of state contract law: "Rather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation." *Id.* at 673-74.[2] In accord with its recognition of the primacy of substantive contract law in determining the content of an agreement to arbitrate,

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[2] The contract at issue in *Stolt-Nielsen* was a "standard contract" for the carriage of goods by ship "known in the maritime trade as a charter party." *Stolt-Nielsen*, 559 U.S. at 666. Accordingly, and unlike this case, maritime law therefore served as the source of substantive law in addition to state contract law.

this Court rejected the panel's attempt "simply [to] impose[] its own conception of sound policy." *Id.* at 675.

Just as a party may not be bound to class arbitration absent its consent, this Court in *Oxford Health* recognized that a party may not escape class proceedings when such a contractual basis for finding its consent is present. *See Oxford Health*, 569 U.S. at 570-71. In that case, the arbitrator "construe[d] the arbitration clause in the ordinary way to glean the parties' intent" and "found that the arbitration clause unambiguously evinced an intention to allow class arbitration." *Id.* at 567-68. The arbitrator thus "did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration." *Id.* at 571. Whereas in the arbitral panel in *Stolt-Nielsen* "abandoned [its] interpretive role," 559 U.S. at 673-74, the arbitrator in *Oxford Health* correctly relied on substantive contract law to "provide[] an interpretation of the contract resolving the disputed issue." 569 U.S. at 573. This Court accordingly held that it must affirm the arbitrator's order of class proceedings. *Id.*

The FAA's foundation in state contract law, a grounding this Court has repeatedly recognized, is consistent with this Court's longstanding recognition of a federal policy favoring arbitration. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476. Congress's "'preeminent concern . . . in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [the Court] rigorously enforce agreements to arbitrate.'" *Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985) (quoting *Dean Witter*, 470 U.S. at 221). Because "arbitration agreements, like other contracts, 'are enforced according to their terms' and according to the intentions of the parties," *First Options*, 514 U.S. at 947 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995)), the federal policy favoring the enforcement of arbitration agreements requires courts to respect the arbitral procedures the parties agreed to in the contract, including when they agree to class procedures.

This Court has recognized only a limited exception to the rule that state contract law governs arbitration agreements. Because "courts must place arbitration agreements on an equal footing with other contracts," a state may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 341 (2011) (citations and quotation marks omitted). That limited exception serves to ensure equal treatment of arbitration agreements by "displac[ing] any rule that covertly . . . disfavor[s] contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Such specific targeting to disfavor arbitration as such demarcates the limit of the FAA's preemption of state contract law. *See, e.g.*, *Rent-a-Center*, 561 U.S. at 68 ("Like other contracts, however, [arbitration agreements] may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.") (citation and quotation marks omitted).

Beyond that limited exception, however, this Court has consistently made clear that arbitration agreements are a matter of contract and that courts should apply substantive state contract law to them as they would any other contract.

II. State Contract Law Provides Rules Of Interpretation That Determine The Content Of The Parties' Agreement.

The general principle that state contract law governs the scope and content of a contract applies in full force to interpreting ambiguities in an arbitration agreement. "[T]he interpretation of a contract is ordinarily a matter of state law to which [this Court] defer[s]." *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (citation omitted). *See also First Options*, 514 U.S. at 944 (the interpretation of arbitration agreements requires courts to "apply ordinary state-law principles that govern the formation of contracts") (citations omitted); *Mastrobuono*, 514 U.S. at 60 n.4; *Volt*, 489 U.S. at 474.

In accord with that principle, this Court has refused to revisit the interpretation of arbitration agreements under state law. In *Volt*, this Court confronted a contract with a choice-of-law provision designating California law to govern disputes arising from the contract. *Volt*, 489 U.S. at 470. The California court, applying state contract law, interpreted that term to "incorporate[] the California rules of arbitration," even though neither the choice-of-law provision nor the arbitration clause in the contract expressly addressed those procedures. *Id.* This Court rejected the petitioner's attempt to "convince[e] [the Court] that the [lower court] erred

in interpreting the choice-of-law provision to mean that the parties had incorporated the California rules of arbitration into their arbitration agreement." *Id.* at 474. It refused even to consider the merits of the lower court's interpretation of the contract, because "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.*

This Court has departed from that deference only in circumstances not present here. In *Imburgia*, this Court rejected the lower court's interpretation of the phrase "law of your state" to include a California statute that had been invalidated by the Court's decision in *Concepcion*. 136 S. Ct. at 471. The Court based its holding on the "conclu[sion] that California courts would not interpret contracts other than arbitration contracts the same way." *Id.* at 469. Because the lower court's "interpretation of this arbitration contract [was] unique, restricted to that field," *id.*, that interpretation was not, in the Court's view, the application of generally applicable contract principles. The FAA therefore preempted the lower court's interpretation of the contract only because it arose from a legal rule that, like the unconscionability rule in *Concepcion*, specifically targeted and disfavored arbitration.

Because there is no indication that the arbitration agreement here has been interpreted in a way different from other contracts, its proper interpretation was rendered by reference to generally applicable state contract law.

III. States Sensibly Adopt Rules Of Contract Interpretation That Construe Ambiguous Arbitration Agreements Against Their Drafters To Permit Class Proceedings.

The FAA thus respects States' authority to craft generally applicable rules of contract interpretation that apply to arbitration agreements. When the terms of a contract contain an ambiguity, courts must employ background rules of interpretation to determine the content of the parties' agreement. The court of appeals here relied on a sensible and universally recognized rule of interpretation: that courts interpret ambiguous contractual terms against the interest of the drafting party. That rule of contract law finds support in the law of every State, in this Court's cases, in the leading treatises, and in the academic literature.

As the court of appeals recognized, "[i]n California, a contract is ambiguous 'when it is capable of two or more constructions, both of which are reasonable.'" Pet. App. 2a-3a (quoting *Powerine Oil Co. v. Superior Court of L.A.*, 118 P.3d 589, 598 (Cal. 2005)). The arbitration clause at issue in this case does not expressly address whether class proceedings are permitted or prohibited. *See* Pet. App. 9a.[3] In the absence of any

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[3] In *Stolt-Nielsen*, this Court based its decision on the parties' stipulation that the contract there was "'silent' with respect to class arbitration." 559 U.S. at 668. The Court explained that this stipulation "did not simply mean that the clause made no express reference to class arbitration. Rather . . . '[a]ll the parties agree[d] that . . . there's been no agreement that has been reached on that issue.'" *Id.* at 668-69 (citation omitted, first alteration in original). The arbitration clause at issue in this case is *not* "silent" in that sense. It is "silent" *only* in the sense that it contains no "express

express textual indication (or any other indication) in the contract to determine whether the parties agreed to permit or to prohibit class arbitration, the contract was ambiguous with respect to which set of arbitral procedures apply. The court of appeals then properly looked to state contract law rules of interpretation to determine the content of the parties' agreement.

The court of appeals accordingly relied on California's longstanding rule of contract interpretation that "[a]mbiguity is construed against the drafter, a rule that 'applies with peculiar force in the case of a contract of adhesion.'" Pet. App. 3a (quoting *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016)). The court below thus engaged in precisely the inquiry this Court found lacking in *Stolt-Nielsen*: determining whether California law "contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent." *Stolt-Nielsen*, 559 U.S. at 673-74.

The California courts' rule comports with the unanimous consensus among States. Every state supreme court has adopted the principle that an ambiguous

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reference" to class arbitration. The core issue in this case is whether, in the absence of such an express textual indication, the parties agreed to permit or to prohibit class proceedings. The Court in *Stolt-Nielsen* expressly declined to address that question: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." *Id.* at 687 n.10.

contract should be interpreted against its drafter.[4] Those cases apply the rule to virtually every type of

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[4] *See, e.g., Daphne Auto., LLC v. E. Shore Neurology Clinic, Inc.*, 245 So. 3d 599 (Ala. 2017); *Donahue v. Ledgends, Inc.*, 331 P.3d 342 (Alaska 2014); *Andrews v. Blake*, 69 P.3d 7 (Ariz. 2003); *Carter v. Four Seasons Funding Corp.*, 97 S.W.3d 387 (Ark. 2003); *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814 (Colo. 2004) (en banc); *Ramirez v. Health Net of the Ne., Inc.*, 938 A.2d 576 (Conn. 2008); *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624 (Del. 2003); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003); *Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422 (Ga. 2016); *Koga Eng'g & Constr., Inc. v. State*, 222 P.3d 979 (Haw. 2010); *Fed. Nat'l Mortg. Ass'n v. Hafer*, 351 P.3d 622 (Idaho 2015); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307 (Ill. 2006); *State v. Smith*, 71 N.E.3d 368 (Ind. 2017); *Peak v. Adams*, 799 N.W.2d 535 (Iowa 2011); *Liggatt v. Emp'rs' Mut. Cas. Co.*, 46 P.3d 1120 (Kan. 2002); *Ky. Emp'rs' Mut. Ins. v. Ellington*, 459 S.W.3d 876 (Ky. 2015); *Prejean v. Guillory*, 38 So. 3d 274 (La. 2010); *State Farm Mut. Auto. Ins. Co. v. Koshy*, 995 A.2d 651 (Me. 2010); *MAMSI Life & Health Ins. Co. v. Callaway*, 825 A.2d 995 (Md. 2003); *James B. Nutter & Co. v. Estate of Murphy*, 88 N.E.3d 1133 (Mass. 2018); *People v. Yamat*, 714 N.W.2d 335 (Mich. 2006); *Staffing Specifix, Inc. v. Tempworks Mgmt. Servs, Inc.*, 913 N.W.2d 687 (Minn. 2018); *Dalton v. Cellular S., Inc.*, 20 So. 3d 1227 (Miss. 2009); *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772 (Mo. 2005); *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 353 P.3d 483 (Mont. 2015); *Beveridge v. Savage*, 830 N.W.2d 482 (Neb. 2013); *Am. First Fed. Credit Union v. Soro*, 359 P.3d 105 (Nev. 2015); *State Farm Mut. Auto. Ins. Co. v. Desfosses*, 536 A.2d 205 (N.H. 1987); *Roach v. BM Motoring, LLC*, 155 A.3d 985 (N.J. 2017); *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003); *Village of Ilion v. County of Herkimer*, 18 N.E.3d 359 (N.Y. 2014); *Baxley v. Nationwide Mut. Ins. Co.*, 430 S.E.2d 895 (N.C. 1993); *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 855 N.W.2d 614 (N.D. 2014); *World Harvest Church v. Grange Mut. Cas. Co.*, 68 N.E.3d 738 (Ohio 2016); *McMinn v. City of Okla. City*, 952 P.2d 517 (Okla. 1997); *ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 241 P.3d 710

contract and term, extending far beyond the context of arbitration. The rule's longstanding and universal application has put every contracting party, especially the sophisticated parties who are likely to be disadvantaged by it, on notice that contracts they draft lack clarity at their peril.

In accord with that unanimous consensus among the States, this Court has long recognized "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62 (citations omitted). The Court has further incorporated into federal law the "general maxim that a contract should be construed most strongly against the drafter." *United States v. Seckinger*, 397 U.S. 203, 210 (1970). Accordingly, under the FAA when a party "draft[s] an ambiguous document . . . [it] cannot now claim the benefit of the doubt." *Mastrobuono*, 514 U.S. at 63.

(Ore. 2010), *modified on other grounds*, 249 P.3d 111 (Ore. 2011) (en banc); *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007); *Haviland v. Simmons*, 45 A.3d 1246 (R.I. 2012); *Hueble v. S.C. Dep't of Nat. Res.*, 785 S.E.2d 461 (S.C. 2016); *Citibank (S.D.), N.A. v. Hauff*, 668 N.W.2d 528 (S.D. 2003); *West v. Shelby Cty. Healthcare Corp.*, 459 S.W.3d 33 (Tenn. 2014); *Lopez v. Muñoz, Hockema & Reed, LLP*, 22 S.W.3d 857 (Tex. 2000); *Ellsworth v. Am. Arbitration Ass'n*, 148 P.3d 983 (Utah 2006); *Southwick v. City of Rutland*, 35 A.3d 113 (Vt. 2011); *Cappo Mgmt. V, Inc. v. Britt*, 711 S.E.2d 209 (Va. 2011); *Sprague v. Safeco Ins. Co. of Am.*, 276 P.3d 1270 (Wash. 2012); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 693 S.E.2d 53 (W. Va. 2010); *Md. Arms Ltd. P'ship v. Connell*, 786 N.W.2d 15 (Wisc. 2010); *BNSF Ry. Co. v. Box Creek Mineral Ltd. P'ship*, 420 P.3d 161 (Wyo. 2018).

The leading contracts treatises confirm that principle's universal acceptance and wide application. The Restatement explains that "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Restatement (Second) of Contracts § 206 (1981). This Court has quoted the Restatement's rationale for that rule approvingly: "'Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning.'" *Mastrobuono*, 514 U.S. at 63 n.10 (quoting *id.*, Comment *a*). *Accord* 11 Williston on Contracts § 32:12 ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.") (rev. 2018); 5 Corbin on Contracts § 24.27 (rev. 2018); 2 Farnsworth, Contracts § 7.11 (rev. 2018).

That rule serves to ensure the parties' actual agreement to the terms of the contract. The academic literature often analyzes contract rules that disfavor the better informed, drafting party as "information-forcing default rules." *See, e.g.*, J. H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 Wm. & Mary L. Rev. 899, 906 (2015); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91 (1989); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*,

89 Yale L.J. 1261, 1299-1300 (1980). By setting the default rule to what the drafting party does *not* prefer as a "penalty," the law provides the drafter with an incentive to include an express term in the contract. That express term, in turn, serves to inform the non-drafting party of the terms of the deal.

This Court has similarly recognized that sensible rationale. In *Mastrobuono*, this Court grounded its interpretation of the arbitration agreement disfavoring the drafting party by noting the information asymmetry between the parties. The Court explained that, "[a]s a practical matter, it seems unlikely that [the non-drafting parties] were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right." *Mastrobuono*, 514 U.S. at 63. In light of that likely lack of knowledge of the background legal rule, the Court was "unwilling to impute th[at] intent" to the non-drafting party. *Id.*

So too with class arbitration waivers. Sophisticated firms that draft consumer and employment contracts, typically with the assistance of skilled counsel, are far more likely to know the background rules of contract law than are their consumer and employee counterparties. When those counterparties are unaware of the background contract rules that apply to a contract that does not expressly state whether class proceedings are permitted or prohibited, they do not consent to the arbitration agreement to the same degree that they would with full knowledge. That is particularly true in the modern era where most people are aware that class action litigation is generally available but have no

reason to suspect that the opposite would be true in arbitration. A default rule of interpretation that presumes the parties have agreed to class arbitration unless the contract expressly provides otherwise thus serves to enhance contractual consent to arbitration agreements by putting all parties on notice of the arbitral procedures they have agreed to adopt.

That rule of interpretation comports with the requirements of the FAA. This Court previously contemplated state law rules that serve to ensure that both parties to the arbitration agreement are fully aware of the procedures to which they are bound. In *Concepcion*, while holding that a blunt prohibition on class waivers conflicts with the FAA, the Court reassured States that they "remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted." 563 U.S. at 346-47 n.6. It is difficult to see how a requirement that class waivers be highlighted would be consistent with the FAA while, as petitioners would have it, a default rule of interpretation that requires a class waiver to be explicitly stated in the first place would run afoul of the FAA.

The rule's modest result—that drafting parties are free to draft a contract that favors their interest by prohibiting class arbitration, but if they wish to do so they must do so explicitly by agreement—comports with the FAA's fundamental grounding in contract law. Just like the common-sense requirement that parties must expressly state an agreement to arbitrate—the default rule is that they have *not* agreed to arbitration—the sensible state contract rule that requires parties to

expressly waive class procedures comports with universally accepted, generally applicable rules of state contract law and is consistent with the FAA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 17-988

IN THE
Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,
Petitioners,

v.

FRANK VARELA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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Yahoo! Inc. v. Iversen,
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Other Authorities

Alan B. Morrison, *Can Mandatory Arbitration of Medical Malpractice Claims Be Fair, The Kaiser Permanente System*, 70 Disp. Resol. J. 35 (2015) 11

American Arbitration Association, 2016 Annual Report, p. 8 13

Arbitration: Simpler, Cheaper and Faster Than Litigation (U.S. Chamber Institute for Legal Reform Apr. 2005) 9

Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55 (2007) 5, 17, 20

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Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105 (2003) 16

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 10

Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711 (2006) 21

Roy Weinsten, et. al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, p. 3, Mirconomics Economic Research and Consulting (2017)..... 13

Searle Institute, *Creditor Claims in Arbitration and in Court Interim Report No. 1, Executive Summary* (Nov. 2009)..... 10

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STATEMENT OF INTEREST[1]

DRI – The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 23,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation for the role of defense lawyers in the civil justice system, anticipating and addressing substantive and procedural issues germane to defense lawyers, and achieving fairness in the civil justice system. To help foster these objectives, DRI participates as *amicus curiae* at both the petition and merits stages in carefully selected Supreme Court cases presenting questions that significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

Arbitration is an issue of particular interest since DRI members often advise or represent clients in drafting contracts containing arbitration clauses and in subsequent proceedings. Frequently, such contractual disputes address the enforceability of arbitration agreements. Based on the informed interest and relevant experience of its members, DRI

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have obtained consent to the filing of this amicus brief pursuant to Rule 37.

has submitted several amicus briefs in recent years in cases presenting issues under the Federal Arbitration Act (FAA). See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015).

The Ninth Circuit's opinion, which reads an agreement to participate in "arbitration" to mean an agreement to participate in class arbitration, will subject numerous defendants to the very financial risks and burdens they sought to contain by contracting for arbitration. Based on its members' extensive practical experience, DRI is uniquely well-suited to explain to the Court why class arbitration is a fundamentally different, more complex, and expensive process than individual or bilateral arbitration, and why an agreement to arbitrate should be interpreted to mean bilateral arbitration only, absent an express agreement for class arbitration.

DRI is uniquely qualified to explain to the Court why the decision below distorts generally applicable contract law, creates an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements that benefit customers and businesses alike, and generally conflicts with the liberal federal policy favoring arbitration. In addition, DRI desires to explain why, in its members'

experience, class actions are fundamentally incompatible with arbitration and its benefits.

DRI and its members seek uniform application of arbitration agreements silent on the issue of class arbitration, in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. The Ninth Circuit's decision in this case thwarts that goal. DRI thus has a vital interest in this case.

SUMMARY OF ARGUMENT

"[C]lass arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen S.A.*, 559 U.S. at 685. The Ninth Circuit's decision in this case essentially nullifies *Stolt-Nielsen S.A.* by concluding that ordinary arbitration-clause language, silent on the issue of class arbitration, is enough to authorize class arbitration absent a waiver. And it did so by employing a California-law rule of contractual interpretation – that ambiguities in a contract should be construed against the drafter – to create a disproportionate impact on arbitration. This is not the proper approach.

Bilateral arbitration is favored under federal law, the laws of many states, and this Court's jurisprudence, because it is inexpensive, streamlined, and efficient. Class arbitration, by contrast, is a markedly different procedure that offers none of these advantages. It is costly, risky, cumbersome, and may even involve substantial judicial oversight – the very attributes that generally motivate parties to choose traditional bilateral arbitration over litigation in the first place.

Compelling parties to resolve disputes through costly, time consuming, and high-stakes class-wide arbitration, when the parties have not agreed to do so and have merely agreed to have *their own* personal disputes resolved through arbitration (the very

definition of bilateral arbitration), frustrates the parties' intent, undermines their agreements, and erodes the benefits offered by arbitration as an alternative to litigation. Imposing class arbitration on parties who have not agreed to that procedure also conflicts with the central goal of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* to ensure that arbitration agreements are enforced strictly according to the terms adopted by the parties. *Am. Express Co.*, 570 U.S. at 233.

The Ninth Circuit's failure to properly apply this Court's precedents subjects Petitioners, and will subject countless other defendants, to complex, high-stakes, class arbitration procedures to which they never agreed. That result is incompatible with the principle that contractual agreement is the cornerstone on which the arbitration system rests. Under such a regime, with "millions of dollars and perhaps the company's future at risk," and absent "the safeguards litigation provides[,] the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option." Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 71-74 (2007) (citations omitted). The experience of DRI members confirms that these risks are real.

The Ninth Circuit incorrectly imposed class-wide arbitration based solely on a clause in an individual contract that – without saying a word about class arbitration – merely required the parties to arbitrate all disputes. This decision is contrary to

this Court's guidance, particularly in *Stolt-Nielsen S.A.*, that an arbitrator may not order class-wide arbitration when an arbitration agreement is "silent" on the issue of class arbitration. If allowed to stand, the Ninth Circuit's decision will adversely affect the judicial system and the rule of law by subjecting parties to expensive, protracted proceedings to which they never agreed when contracting for arbitration. The Ninth Circuit's decision should be reversed.

ARGUMENT

A. Bilateral arbitration is a favored choice for many, offering economic advantages for both parties to a dispute, streamlined procedures, and speedy resolution of claims.

The FAA, enacted nearly a century ago in response to "widespread judicial hostility to arbitration agreements[,]" reflects both a "'liberal federal policy favoring arbitration'" and the "'fundamental principle that arbitration is a matter of contract.'" *Concepcion*, 563 U.S. at 339. Under the FAA, parties may agree "to arbitrate according to specific rules" and courts must enforce those agreements "according to their terms." *Id.* at 344. The FAA thus ensures not only that arbitration agreements are enforceable, but also that hostility to arbitration is not permitted to transform arbitration by replicating the most expensive and formal aspects of judicial proceedings. *Stolt-Nielsen S.A.*, 559 U.S. at 682; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

The cornerstone of arbitration is that it "is a matter of consent, not coercion." *Volt*, 489 U.S. 479. This is particularly important in the class arbitration context. In *Stolt-Nielsen S.A.*, this Court explained that the absence of specific language barring class arbitration is not sufficient to show consent:

> [A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so...The critical point, in the view of the arbitration panel, was that petitioners did not establish that the parties to the charter agreements intended to *preclude* class arbitration...[T]he panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

559 U.S. at 684 (emphasis in original; internal quotations and citations omitted). Accordingly, parties may structure their arbitration agreements as they see fit, specify the governing rules, and specify *with whom* they choose to arbitrate their disputes. *Id.* at 683, citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement" (emphasis added)).

These ground rules for arbitration are important. Arbitration agreements are commonplace in every corner of the economy, and the benefits of bilateral arbitration have been recognized by this Court, arbitration participants, and skeptics alike. Bilateral arbitration gives consumers "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-281

(1995); *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1464 (2009) (same); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (same). Streamlined procedures minimize the "delays, expense, uncertainties, loss of control, * * * and animosities that frequently accompany litigation." Y2Y Act, Pub. L. No. 106-37, §§ 2(a)(3)(B)(iv), 2(b)(3), 113 Stat. 185, 186-187 (1999) (encouraging businesses and users of technology to use "alternative dispute mechanisms" to avoid "costly and time-consuming litigation").

Bilateral arbitration is also hailed for the procedural and administrative benefits it offers. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A.*, *supra*, at 685. This is just one of the reasons consumer satisfaction with bilateral arbitration is high. See, e.g., A Harris Interactive Survey, *Arbitration: Simpler, Cheaper and Faster Than Litigation* (U.S. Chamber Institute for Legal Reform Apr. 2005) (detailing high satisfaction with arbitration results and process, including speed and simplicity).

Empirical data confirm that consumers often "fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation." Joshua S. Lipshutz, *Note, The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration*

Agreements and Class Action Lawsuits, 57 Stan. L. Rev. 1677, 1712 (2005). Even two decades ago, one study showed that employees collectively received 10.4% of their demand in litigation, compared with 18% in arbitration. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998). This trend has continued to hold true over time. The Searle Civil Justice Institute preliminary report released on consumer arbitrations administered by the American Arbitration Association (AAA) revealed that consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed). See Consumer Arbitration Before the American Arbitration Association Preliminary Report, available at http://www.searlearbitration.org/report.

A second study by Searle, this time involving debt collection, showed that "[c]reditors prevailed less often (that is, consumers prevailed more often) in the arbitrations studied than in court...even after controlling for differences among the types of cases and the venue in which they were brought" and that "[c]reditor recovery rates in the arbitrations studied were lower than, or comparable to, creditor recovery rates in court...[e]ven after controlling for differences among the cases." Searle Institute, *Creditor Claims in Arbitration and in Court Interim Report No. 1, Executive Summary* (Nov. 2009) (emphasis eliminated), available at http://www.law.northwestern.edu/searlecenter/uploads/CREDITOR%20CLAIMS%20IN%20ARBITRATIO

N%20AND20IN%20COURT%20INTERIM%20REPORT%20N0.%201.pdf.

Even self-described "arbitration skeptics" concede the benefits bilateral arbitration affords. In a recent study, legal scholar Alan B. Morrison examined in depth the mandatory arbitration system used by the self-insured umbrella health maintenance organization Kaiser Foundation Health Plan, Inc., which operates the Kaiser Permanente medical delivery system for seven-plus million members. Alan B. Morrison, *Can Mandatory Arbitration of Medical Malpractice Claims Be Fair, The Kaiser Permanente System*, 70 Disp. Resol. J. 35 (2015). Nearly every California Kaiser member is required to sign, as part of joining the program, an agreement to arbitrate all medical malpractice claims under the Kaiser Permanente system. In 2013, the program received 657 demands for arbitration. *Id.* at 36.

Morrison concluded that the Kaiser Permanente arbitration system can result in very equitable relief to individuals who are genuinely injured, and in a much more cost-effective and speedy way than traditional litigation. The filing fee to make a claim under the Kaiser arbitration system is $150, compared to $400 (or more) for federal and California court filing fees. *Id.* at 46. Additional savings to claimants resulted from Kaiser Permanente's payment of the full cost of the arbitrator's fee in 90% of the cases in 2013. *Id.* at 47. The rules of the Kaiser Permanente Board require that all cases be completed – and awards rendered – within 18

months of filing (absent limited exception). *Id.* at 49. In 2013, the average completion time was 11 months for all cases, and 60% were resolved in less than one year. *Id.* When compared with the average time of 43 months between occurrence of an incident and resolution of the claim in the court system (in this particular study, 39.7% of the cases were from California), "it is clear that claims brought by Kaiser patients are resolved through arbitration much more rapidly than they would be in court." *Id.* at 50.

Morrison's positive evaluation of the Kaiser Permanente arbitration system revealed a high degree of user satisfaction, both from lawyers for the parties, arbitrators, and claimants. *Id.* at 52-53. The reality that "no claimant who does not have counsel can hope to survive long enough to reach trial" due to "the many rules applicable to medical malpractice cases in the California courts" is not true with Kaiser Permanente's arbitration system. *Id.* at 56. In 2013, 26% of the claimants were without counsel, and five claimants without counsel went to trial within the arbitration system that year. *Id.* at 56-57.

The Kaiser Permanente arbitration system is just one example of a bilateral arbitration system working to produce just results in an efficient manner. The American Arbitration Association, commissioning a study, "Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings" in 2016, confirmed that "[o]n average, U.S. District Court cases took more than 12 months longer to get to trial than cases using arbitration." American

Arbitration Association, 2016 Annual Report, p. 8, available at https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_2017.pdf. And these "delays to adjudication are not without cost." Roy Weinsten, et. al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, p. 3, Mirconomics Economic Research and Consulting (2017). The trickledown effect of delays in resolving disputes is well-illustrated in this example:

> A dispute between a supplier and purchaser in which the supplier claims the purchaser owes $1 million leaves both supplier and purchaser uncertain as to which party will retain the funds after the dispute has been adjudicated. The purchaser cannot comfortably invest the $1 million to hire new employees since it may be required to pay the supplier once the dispute has been adjudicated. Likewise, the supplier cannot use the funds to purchase new equipment because it may never receive the money. Both parties are thus constrained; the funds are unavailable to either; both parties experience a loss until the dispute is resolved. *Id.*, pp. 3-4.

Quantitatively, "direct losses associated with *additional time to trial* required for district court cases compared with AAA arbitration are approximately **$10.9 - $13.6 billion** between 2015 and

2016 (i.e. more than **$180 million per month**)." *Id.*, p 4 (emphasis in original).

The fact "that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v Pyett*, 556 U.S. 247, 269 (2009) (emphasis added); *Concepcion*, 563 U.S. at 348 (observing "informality" as "the principal advantage of arbitration"). DRI's members expect that bilateral arbitration will continue to be a favored way for their clients to efficiently and effectively resolve their disputes. In fact, many of DRI members' clients utilize arbitration clauses in their warranties to not only provide remedies to injured persons, but also to foster a good reputation in their respective industries. However, if bilateral arbitration clauses are interpreted to authorize class arbitration, as the Ninth Circuit held, the benefits of arbitration will be lost. Defendants, in turn, will be forced to revert to traditional litigation proceedings to resolve disputes. This is inefficient for all.

B. The Ninth Circuit decision eliminates vital benefits of bilateral arbitration that are not present in class arbitration.

The advantages of traditional, bilateral arbitration just described do not exist in class arbitration. Class arbitration is by its very nature protracted, complex, and expensive. As this Court recognized in *Stolt-Nielsen S.A.*, class-wide

procedures are inherently incompatible with the traditional advantages and essential features of arbitration. The Ninth Circuit's insistence on class-wide arbitral procedures even where an arbitration agreement is silent on class arbitration destroys the benefits of traditional arbitration and is but another effort to "chip away at [the FAA] by indirection." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001).

The delay inherent in class arbitration is in stark contrast to the speed and efficiency of individual consumer arbitration. In short, class arbitration offers none of the advantages of traditional arbitration - e.g., its speed, low cost, and streamlined proceedings - that both Congress and this Court have recognized are helpful to business and consumers alike.

Class arbitration lacks the safeguards and judicial oversight that are indispensible to class litigation. The judicial oversight that accompanies class-action litigation also guarantees certain protections that benefit both plaintiffs and defendants. Defendants benefit from procedural mechanisms that end meritless litigation before discovery or trial and ensure a hearing before a judge with no financial incentive to certify a class. Both sides benefit from full appellate review at all critical stages of the litigation. Finally, class members benefit from judicial protection of their due-process rights, which also provides defendants with assurance that absent class members will be bound

by the result. None of these protections is assured in class arbitration, and some are nonexistent.

This Court has imposed pleading standards in class actions designed to ensure that meritless cases are dismissed at an early stage before a defendant is subjected to expensive and protracted discovery. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("District courts must be especially alert to identify frivolous [class actions] brought to extort nuisance settlements...."). Motions to dismiss and motions for summary judgment are thus common methods for disposing of legally and factually deficient lawsuits short of trial. In class arbitration, however, dispositive motions are disfavored; indeed, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 113 (2003). In individual arbitration, this procedural limitation is widely accepted as part and parcel of arbitration's informality and streamlined proceedings. In class arbitration, however, the likely unavailability of early dispositive motions exposes defendants to the expense of discovery and even a merits hearing on meritless claims. *Cf. Twombly*, 550 U.S. at 559 ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases").

In addition, class arbitration creates the special problem that arbitrators have powerful financial incentives to certify a class. Put simply, arbitrators, who are compensated based on the

amount of time they devote to a case, stand to earn far more if they allow a class arbitration to proceed than if they do not. Clancy & Stein, *supra*, at 73-74. As this Court has recognized, a party "might ... with reason" fear a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against him." *Tumey v. Ohio*, 273 U.S. 510, 523, 533 (1927).

Reinforcing this concern, the AAA's statistics indicate that arbitrators are in fact more likely to certify a class than either federal or state judges. Arbitrators granted 24 of the first 42 contested class-certification motions filed under the AAA Rules - a grant rate of 57.14%. See AAA *Stolt-Nielsen* Brief at 22. In contrast, in a Federal Judicial Center study on the impact of CAFA, federal judges granted only 18 of 62 contested class-certification motions - a rate of only 29.03%. Willging & Wheatman, *Attorney of Choice Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 634-35 (2006). In the same study, state judges granted 12 of 27 contested motions - a rate of 44.44%. Thus, AAA arbitrators appear nearly *twice* as likely to grant class certification as federal judges, and significantly more likely to certify a class than even state court judges - the very judges whose "[a]buses" provoked CAFA's enactment (CAFA §2(a)(4)). In light of such incentives and evidence, most if not all defendants will choose federal courts, where they "have no reason to suppose that [the district judge] wants to preside over an unwieldy class action" (*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995)), over arbitration.

The extremely narrow scope of judicial review of arbitrators' class-certification decisions and final awards on the merits also poses intolerable risks for defendants. As this Court recently held, section 10 of the FAA lists the "exclusive" grounds for vacating an award, all of which "address egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Courts may not engage in "legal review generally." *Id.* In the context of individual arbitration, this limitation is necessary "to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. "If ... parties who lose in arbitration [could] freely re-litigate their cases in court, ... dispute resolution [would] be slower instead of faster[,] and reaching a final decision [would] cost more instead of less." *B.L. Harbert Intl, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907 (11th Cir. 2006).

In a class arbitration, however, the vastly increased stakes coupled with narrow judicial review amplify the cost of arbitrator error to an unacceptable level. As Justice Scalia put the problem: "You might not want to put your company's entire future in the hands of one arbitrator." Oral Argument Tr., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), available at http://www.oyez.org/cases/2000-2009/2002/2002_02_634/argument; see also *Stolt-Nielsen S.A.*, 130 S.Ct. at 1776 ("[T]he commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope

of judicial review is much more limited."). No rational business will do so willingly. *Concepcion*, 563 U.S. at 351 ("when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable.").

The cost savings of individual arbitration do not translate to class arbitration. Indeed, given that it entails substantial arbitrators' fees that have "no equivalent in a traditional, judicial class action," class arbitration may prove more expensive than its judicial counterpart. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 64 (2007). At minimum, it is clear that, unlike individual arbitration, it is *not* a "less expensive alternate to litigation." *Allied-Bruce*, 513 U.S. at 280.

Empirical data on class arbitration confirm that the procedure is just as cumbersome as a judicial class action, if not more so. AAA statistics show that "the median time frame from filing [a AAA class arbitration] to settlement, withdrawal, or dismissal – not judgment on the merits – was 583 days, and the mean was 630 days." *Concepcion*, 563 U.S. at 349. While 19-21 months might be a reasonable period in which to resolve the merits of a class dispute, that is not what these statistics reflect. Rather, 85% of the cases included in the average were terminated, i.e., settled, withdrawn, or dismissed, *before any ruling on class certification* – and *none* "resulted in a final award on the merits."

AAA *Stolt-Nielsen* Brief at 23. Thus, like its court-administered counterpart, a class arbitration is likely to take years to complete.

Even in court, a class-action defendant faced with such significant potential liability is "under intense pressure to settle" (*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298-1299), "even if the [plaintiffs'] position is weak" on the merits (*Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001)). In class arbitration, the lack of meaningful review - both at the class certification stage and on the merits - intensifies this pressure and exacerbates the problem of "blackmail settlements." Indeed, a prominent plaintiffs' attorney speaking at an American Trial Lawyers Association convention touted that "decision[s] by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable" as "a feature which terrifies corporate defendants." Clancy & Stein, *supra*, at 71; *cf. Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172 (3d Cir. 2010) (en banc) (rejecting plaintiffs' argument that the enforceability of a class waiver should be determined by the arbitrator, not the court).

In an apparent attempt to address one aspect of this problem, the AAA authorizes the parties to pursue interlocutory judicial review of arbitrators' class-certification decisions, describing the opportunity as "akin to ... interlocutory appellate review of district court class certification decisions." AAA *Stolt-Nielsen* Brief at 19. This comparison is inapt because the arbitrator's decision is reviewable

only on the narrow grounds specified in 9 U.S.C. § 10; more searching review "akin to" federal appellate review under Fed. R. Civ. P. 23(f) appears to be foreclosed by *Hall Street*. Thus, the review contemplated by the AAA rules remains an inadequate safeguard.

Finally, it remains uncertain whether class arbitration is capable of protecting class members' due process rights and producing legally binding results. Most courts have held that due-process protections do not apply to private arbitration because the parties "voluntarily" consent to the arbitral process. *E.g., Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991). How this reasoning applies to class arbitration remains unclear. For example, do absent class members "voluntarily" consent to a class arbitration, even if they never receive actual notice of its pendency? If not, will an arbitration that fails to "provide minimal procedural due process protection" bind absent class members? *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Are arbitrators even capable of providing such protections? See generally, e.g., Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711 (2006) (concluding that, without significant ongoing judicial supervision, arbitrators are not capable of providing such protections).

As this Court has recognized, whether a class-action defendant "wins or loses on the merits, [it] has a distinct and personal interest in seeing the entire

plaintiff class bound by [the judgment] just as [it] is bound." *Shutts*, 472 U.S. at 805. No rational defendant will agree voluntarily to a procedure that involves all the same risks and potential liability of a class action without the concomitant assurance that the result will bind absent class members. But left intact by this Court, the Ninth Circuit's decision – which authorizes class arbitration even absent express agreement – forces defendants into this exact predicament.

C. An arbitration clause which contracts for "arbitration" in the context of resolving individual disputes between the claimant and defendant should not be interpreted to authorize class arbitration.

Using California contract interpretation principles, the Ninth Circuit concluded that an arbitration agreement in which Respondent agreed to arbitrate "any right...relating to *my employment* with the Company" authorized class arbitration. *Varela v. Lamps Plus, Inc.*, 701 Fed. Appx. 670, 672 (9th Cir. 2017) (emphasis added). In this way, the Ninth Circuit's decision bears a striking resemblance to the California Court of Appeal's decision in *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015), in which the court of appeal purported to apply California contract interpretation principles in a gerrymandered way to ensure that arbitration as envisioned under the FAA cannot take place. In both cases, the courts used the canon that ambiguities should be construed against the drafter to impose class arbitration. In *Imburgia*, this Court struck

down the court of appeal's decision, finding that its interpretation of the arbitration clause was "pre-empted" by the FAA. *Id.* at 471. This Court recognized that "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." *Id.* at 470.

A like result is warranted here. An arbitrator may not infer an implicit agreement to authorize class-action arbitration from the absence of an explicit agreement to *preclude* class arbitration. *Stolt-Nielsen S.A.*, 559 U.S. at 684-685. The Ninth Circuit relied heavily on the contract's language that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings" to support the arbitrator's finding of assent to class arbitration. 701 Fed. Appx. at 672. But most arbitration agreements that are "silent" on class arbitration contain similar language. See, e.g., *Stolt-Nielsen S.A.*, *supra*, at 667; *Reed v. Fla. Metro. Univ. Inc.*, 681 F.3d 630, 642-43 (5th Cir. 2012); *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 114, 116 (2d Cir. 2011), cert. denied, 132 S.Ct. 1742 (2012). And these courts did not interpret such arbitration clauses to authorize class arbitration.

As the Fifth Circuit correctly noted in substantially similar circumstances, reliance on the "any dispute" language of an arbitration agreement to find assent to class arbitration effectively nullifies *Stolt-Nielsen S.A.*. *Reed*, 681 F.3d at 643 (a "class arbitration award based upon an 'any dispute' clause would be insufficient under Stolt-Nielsen [because] a general arbitration clause, according to the *Stolt-Nielsen S.A.* Court, does not authorize class

arbitration because class arbitration differs too much from individual arbitration") (quotation and citation omitted); *accord Bernal v. Burnett*, 793 F.Supp.2d 1280, 1287-88 (D. Colo. 2011).

The Sixth Circuit has reached the same conclusion. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594 (6th Cir. 2013). Rejecting the argument that the arbitration clause providing for arbitration "'arising from or in connection with *this Order*', as opposed to other customers' orders[,]" authorized class arbitration, the *Reed Elsevier* Court concluded that "[t]he principal reason to conclude that this arbitration clause does not authorize class-wide arbitration is that the clause nowhere mentions it." *Id.* at 599. Even though the agreement "does not expressly exclude the possibility of class-wide arbitration...the agreement does not include it either, which is what the agreement needs to do in order for us to force that momentous consequence upon the parties here." *Id.*

Under the Ninth Circuit's approach, even where the agreement contains no provision reflecting express assent to class arbitration, arbitrators and courts can use a contractual canon to [illegible]eat the ordinary understanding of arbitration – which is bilateral arbitration – and force that "momentous consequence" upon Petitioners. If affirmed, the Ninth Circuit's decision will encourage other courts to impose class arbitration on parties that never agreed to it – elevating a policy preference for the class-action device over the FAA's "basic precept that arbitration is a matter of consent, not coercion."

Stolt-Nielsen S.A., 559 U.S. at 681 (quotation marks omitted). The result is a "palpable evasion" of *Stolt-Nielsen S.A. Varela*, 701 Fed. Appx. at 673 (Fernandez, J., dissenting).

The experience of DRI members bears out this concern. Subsequent to *Stolt-Nielsen S.A.*, many arbitrators and courts limited this Court's holding to the context of a stipulated "no agreement" to class arbitration. *Stolt-Nielsen S.A.*, *supra*, at 687, n. 10 ("[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration."). Some have conjured up justifications for class arbitration in contracts that fall far short of affirmative "consent to resolve...disputes in class proceedings." *Stolt-Nielsen S.A.*, *supra*, at 686-687.[2] This Court should close the pathway that allows such end-runs around its decisions.

Because the relative benefits of class arbitration are much less assured, one should not interpret a contract's silence or ambiguity on class arbitration, as the Ninth Circuit found here, as justification to force unwilling parties to arbitrate in a fashion contrary to their original expectations. Thomas H. Oehmke with Joan M. Brovins, 1

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[2] See, e.g., *Yahoo! Inc. v. Iversen*, 836 F.Supp.2d 1007, 1012-13 (N.D. Cal. 2011); *Smith & Wollensky Rest. Group, Inc. v. Passow*, 2011 WL 148302, at *1 (D. Mass. Jan. 18, 2011); *La. Health Serv. Indem. Co. v. Gambro A B*, 756 F. Supp. 2d 760, 762 (W.D. La. 2010).

Commercial Arbitration § 16.6 (May 2018 Update). In light of the marked differences between bilateral and class arbitration – differences that are far "too great" for a presumption that "arbitration" means "class arbitration" – this Court should add the last piece of the puzzle and conclude that an agreement to arbitrate, absent express language authorizing class arbitration, is an agreement authorizing individual, bilateral arbitration *only*.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC.,
LAMPS PLUS CENTENNIAL, INC.,
LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) seeks to present its views, and the views of its supporters, on the issue whether the Federal Arbitration Act (FAA) permits a court to order two parties who have entered into a standard arbitration agreement to submit to class arbitration, when the agreement makes no mention of class procedures and merely provides that the two parties have agreed to arbitrate their disputes.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

Amicus is committed to the use of arbitration as a contractual alternative to litigation for the resolution of disputes. In this respect,

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored its amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amicus states that counsel of record for each party has consented to the filing of this amicus brief.

NELF is committed to the FAA's related principles that arbitration agreements should be enforced according to their terms, and that arbitration is a matter of consent, not coercion. When, as here, two parties have simply agreed to arbitrate their disputes, the FAA does not permit a court to impose class arbitration.

In addition to this amicus brief, NELF has filed several other amicus briefs in this Court in cases arising under the FAA, arguing for the enforcement of arbitration agreements according to their terms.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

The standard arbitration agreement in this case, between an employer and one of its employees, makes no mention of class procedures. It is a simple agreement between the two parties to arbitrate their disputes, and nothing more. It therefore fails to provide the necessary "contractual basis" authorizing class arbitration, as required by the Federal Arbitration Act (FAA) and *Stolt-*

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[2] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

Nielsen S.A. v. AnimalFeeds Internat'l Corp., 559 U.S. 662 (2010).

The Ninth Circuit erroneously "found" a contractual basis authorizing class arbitration in contract language that merely provides the employee with express notice that, by agreeing to arbitrate with his employer, he has waived his right to sue his employer in court. That contract language adds nothing new to the agreement and simply explains to the employee what it means to agree to arbitrate disputes with his employer. Therefore, it cannot provide a contractual basis authorizing class arbitration.

If allowed to stand, the Ninth Circuit's decision would effectively impose class arbitration as a mandatory implied term in any standard bilateral arbitration agreement that did not expressly preclude it. This would contravene the FAA and the Court's recent decisions interpreting the FAA.

In addition to *Stolt-Nielsen*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), effectively decided the issue raised in this case. There, the Court was also faced with a standard bilateral arbitration agreement that made no mention of class proceedings. However, in *Oxford Health*, the parties had submitted the issue of class arbitration to the *arbitrator* to decide. Therefore, the Court had to affirm the arbitrator's erroneous award of class arbitration, because the FAA did not permit it to review the arbitrator's decision for mistakes of law or fact.

But the Court made it clear throughout its opinion in *Oxford Health* that the arbitrator had erred in finding a contractual basis authorizing class arbitration in a simple bilateral arbitration agreement, such as the one at issue here. In this case, the Court is free to do what it could not do in *Oxford Health*, namely to reject an erroneous interpretation of a standard bilateral arbitration agreement under *Stolt-Nielsen*.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT DOES NOT PERMIT A COURT TO ORDER CLASS ARBITRATION WHEN, AS HERE, TWO PARTIES HAVE SIMPLY AGREED TO ARBITRATE THEIR DISPUTES.

A. *Stolt-Nielsen v. Animal Feeds* Requires A "Contractual Basis" Authorizing Class Arbitration, Which Cannot Be Found In The Parties' Basic Agreement To Arbitrate Their Disputes.

At issue is whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA), permits a court to order class arbitration when two parties have simply agreed to arbitrate their disputes. The standard arbitration agreement in this case makes no mention of class procedures. Appendix to Petition for Certiorari (App.) 24a-35a. Instead, it is a simple *bilateral* agreement, signed by the petitioner, Lamps Plus, Inc., and one of its

employees, the respondent Frank Varela, to resolve "any and all disputes . . . arising out of or relating to . . . the employment relationship *between the parties* . . . by final and binding arbitration as the exclusive remedy." App. 24a (emphasis added). *See also id.* at 28a.[3]

In *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.*, 559 U.S. 662 (2010), this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is *a contractual basis* for concluding that the party *agreed* to do so." *Id.*, 559 U.S. at 684 (emphasis added and in original). This means that when, as here, two parties have "simply agree[d] to submit their disputes to an arbitrator," *Stolt-Nielsen*, 559 U.S. at 685, they have *not* also implicitly agreed to arbitrate their disputes on a classwide basis. "An implicit agreement to authorize class-action arbitration . . . is not a term that the [court or]

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[3] The first paragraph of the parties' arbitration agreement provides:

> Except as provided below, the parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, that are not resolved by their mutual agreement shall be resolved by final and binding arbitration as the exclusive remedy.

App. 24a.

arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.*[4]

Consent to class arbitration would therefore require additional language in the arbitration agreement, quite apart from language stating that the two parties have agreed to submit "any and all disputes . . . [to] final and binding arbitration as the exclusive remedy." App. 24a. But the parties' arbitration agreement in this case is completely silent on the issue of class arbitration and, therefore, fails to provide the necessary contractual basis under the FAA.

B. The Ninth Circuit Erroneously "Found" A Contractual Basis In Contract Language That Merely Provides The Employee With Express Notice Of the Consequences of Agreeing To Arbitrate Disputes With His Employer.

Notwithstanding *Stolt-Nielsen*'s clear directive, and the agreement's utter silence on the issue of class arbitration, a divided panel of the Ninth Circuit nevertheless held that the agreement indicated Lamps Plus's consent to classwide proceedings. App. 2a-5a. In particular, the court

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[4] "This is so because class-action arbitration changes the nature of [one-on-one] arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685.

purported to find a contractual basis in certain language contained in the second and third paragraphs of the parties' agreement. App. 3a-4a.[5]

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[5] The second and third paragraphs of the agreement provide:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.
>
> Claims Covered by the Arbitration Provision
>
> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement. The only claims that are arbitrable are those that, in the absence of this Agreement, would have been available to the parties by law. The claims covered by this Agreement include, but are not limited to, claims for discrimination or harassment based on race, sex, sexual orientation, religion, national origin, age, marital status, or medical condition or disability (including claims under the California Fair Employment and

Turning to the second paragraph, for example, the court stated (with apparently unintended irony) that "[i]t requires no act of *interpretive acrobatics* to include class proceedings as part of a 'lawsuit or other civil legal proceedings,'" all of which Varela agreed to substitute with arbitration in the first paragraph. App. 3a (emphasis added). In the lower court's view, the language of the second and third paragraphs created an ambiguity on the issue of class arbitration, and any ambiguity should be construed against the drafter, Lamps Plus, under California law. App. 4a.

But the Ninth Circuit erred because the second and third paragraphs add nothing new to the parties' agreement. They merely provide Varela with express notice of the consequences of agreeing with Lamps Plus, in the first paragraph, to resolve "any and all disputes . . . by final and binding arbitration as the exclusive remedy." App. 24a. Specifically, the second paragraph explains to Varela that he has waived his right to pursue all

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> Housing Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and any other local, state or federal law concerning employment or employment discrimination). This agreement does not affect the Employee's right to seek relief through the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing.

App. 24a-25a.

arbitrable disputes in court. *Id.* And the third paragraph, appearing under the heading "Claims Covered by the Arbitration Provision," provides Varela with a detailed illustrative list of those arbitrable disputes. *Id.* at 25a.

Far from authorizing class arbitration, then, the second and third paragraphs simply apprise Varela of "the primary characteristic of an arbitration agreement--namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017). Those paragraphs merely explain to Varela what it means to "agree that any and all disputes . . . shall be resolved by final and binding arbitration as the exclusive remedy."[6]

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[6] Indeed, Lamps Plus probably included the second and third paragraphs to ensure the enforceability of its arbitration agreement with Varela under California law. When the agreement was executed, in 2007, App. 28a, the California Supreme Court had raised, but had left unanswered, the question whether California employers must provide employees with express notice of jury waiver in an arbitration agreement such as this one. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 680 n.7 (Cal. 2000) (declining to answer "[t]he question whether the arbitration agreement," requiring employees to submit future disputes about termination to binding arbitration, "was sufficient to permit the employees to knowingly waive the right to a jury trial," because question not preserved in petition for review). *See also* Reply to Answer to Petition for Review of Appellate Court Decision at 1, *Reynolds v. Cornerstone Staffing Solutions Inc.*, (Cal.) (No. S147370) (*review denied* Nov. 29, 2006), 2006 WL 3886802 at *1 ("Only this [California Supreme] Court can definitively answer the question of whether express notice of jury waiver is required for an enforceable mandatory arbitration contract in the context of adhesion. Employers and their counsel need resolution of

Therefore, the Ninth Circuit erred when it identified a contractual basis authorizing class arbitration in the basic notice provisions of Lamps Plus's arbitration agreement with Varela. Contrary to the court's view, that notice language "le[aves] no room for an inquiry regarding the parties' intent" on the issue of class arbitration. *Stolt-Nielsen*, 559 U.S. at 676. *See also* App. 5a ("[T]he Agreement was not ambiguous.") (Fernandez, J., dissenting).

In short, the lower court "[i]mproperly inferred 'an implicit agreement to authorize class-

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this question--one expressly left open in *Armendariz v. Foundation Health Psychcare Services* . . . .").

Similarly, California statutes repeatedly require businesses to include an express notice of waiver of the right to sue in court and obtain a jury trial in certain kinds of consumer arbitration agreements. *See, e.g.*, Cal. Bus. & Prof. Code § 7191 (requiring arbitration provision contained in contract for work on residential property with four or fewer units to state that "YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL."); Cal. Civ. Proc. Code § 1295 (requiring arbitration provision contained in medical services contract to state that "BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL.").

Whether or not the FAA might preempt such contract drafting requirements is not the issue here. Instead, the issue is whether an employer such as Lamps Plus would have deemed it necessary at the time to include such contract language in order to ensure the enforceability of its arbitration agreement with an employee under California law.

action arbitration . . . from the fact of the parties' agreement to arbitrate.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685). Accordingly, the Ninth Circuit's decision should be reversed, and Varela should be required to arbitrate his claims on an individual basis only.

C. In Effect, The Ninth Circuit's Decision Would Erroneously Impose Class Arbitration As A Mandatory Implied Term In Any Standard Bilateral Arbitration Agreement That Did Not Expressly Preclude It.

If allowed to stand, the Ninth Circuit's decision would effectively impose class arbitration as a mandatory implied term in any agreement to arbitrate disputes that did not expressly preclude class proceedings, despite *Stolt-Nielsen*'s clear holding to the contrary. *See also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA."). Under the lower court's approach, an employer or other business could face the risk of class arbitration as soon as it put pen to paper (or the modern-day equivalent) to draft a boilerplate arbitration agreement with another party, such as the agreement at issue here.

As a result, businesses would be loath to choose arbitration if it exposed them to such a risk.

Clearly, the FAA was not intended to cause such undesirable results. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

D. In Addition To *Stolt-Nielsen*, The Court Effectively Decided, In *Oxford Health v. Sutter*, That There Can Be No Contractual Basis Authorizing Class Arbitration In A Standard Bilateral Arbitration Agreement Such As This One.

In addition to *Stolt-Nielsen*, this Court effectively decided the issue presented in this case in *Oxford Health*. In that case, as in this case, the Court was faced with a standard bilateral arbitration agreement that made no mention of class proceedings. *See Oxford Health*, 569 U.S. at 566.[7] In that case, however, the parties had submitted the issue of class arbitration to the

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[7] The arbitration provision at issue in *Oxford Health* stated:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

Oxford Health, 569 U.S. at 566.

arbitrator to decide. *See id.* As with the Ninth Circuit in this case, the arbitrator in *Oxford Health* "found" a contractual basis authorizing class proceedings. *See id.* at 566-67. Oxford Health then moved to vacate the arbitrator's decision under the FAA, arguing that the arbitrator had "exceeded [his] powers" under 9 U.S.C. § 10(a)(4).[8] *Id.* at 568.

The Court affirmed the arbitrator's award of class arbitration, explaining that § 10(a)(4) did not permit it to review his decision for errors of law or fact. *See id.* at 568-73. Even though its hands were tied by the FAA's limited standard of review, the Court nonetheless made it clear, throughout its opinion, that the arbitrator had erred in finding a contractual basis authorizing class arbitration in a simple bilateral arbitration agreement. "[The arbitrator] went against Oxford, maybe *mistakenly so*. But still, Oxford does not get to rerun the matter in a court. Under § 10(a)(4), the question for a judge is not whether the arbitrator construed

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[8] That subsection of the FAA provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
>
> . . .
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(4).

the parties' contract *correctly*, but whether he construed it at all." *Id.* at 573 (emphasis added). *See also id.* at 570 ("[T]he arbitrator focused on the arbitration clause's text, analyzing (*whether correctly or not* makes no difference) the scope of both what it barred from court and what it sent to arbitration.") (emphasis added); *id.* at 572 ("Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading."); *id.* at 569 ("Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, *regardless of a court's view of its (de)merits.*") (emphasis added) (internal quotation marks omitted).

In his concurrence, Justice Alito (joined by Justice Thomas), did not mince his words in expressing his disapproval of the arbitrator's decision. "If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685) (emphasis added).

In this case, of course, § 10(a)(4) of the FAA does not apply because the parties submitted the issue of class arbitration to a court, not an arbitrator. Therefore, the Court is free to "review[] the [Ninth Circuit's] interpretation *de novo*,"

Oxford Health, 569 U.S. at 574. In so doing, the Court should have "little trouble concluding that [the Ninth Circuit] improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 685).

In short, this case allows the Court to do what it could not do in *Oxford Health*, due to the constraints imposed by the FAA. The Court can now reject an erroneous interpretation of a standard bilateral arbitration agreement and reinforce its holding in *Stolt-Nielsen*. Simply put, there can be no contractual basis authorizing class arbitration under the FAA when, as here, two parties have only agreed to arbitrate their disputes.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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No. 17-988

IN THE
Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,
Petitioners,

v.

FRANK VARELA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 100 cases of greatest importance to retailers.

The members of the RLC have a strong interest in the outcome of this proceeding. Relying on the legislative policy reflected in the Federal Arbitration Act ("FAA"), and this Court's consistent endorsement of the federal policy favoring arbitration, many of the RLC's members and affiliates enter into arbitration agreements with their employees. They do so because arbitration allows all parties to resolve disputes quickly

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

The RLC's members enter into arbitration agreements on the premise that arbitration will be conducted on an individual, rather than a class or collective, basis. As this Court recently explained, "permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration" would "'sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347, 348 (2011) (alterations in original)).

The Ninth Circuit's decision would allow courts to impose class arbitration procedures to which contracting parties never consented, to the detriment of both employers and employees, as well as plaintiffs and defendants. Therefore, the members of the RLC have a strong interest in this proceeding.

SUMMARY OF ARGUMENT

The Court should hold that an arbitration agreement does not permit class arbitration unless it contains a clear and unmistakeable statement that class arbitration is authorized, and that a class member can be bound by a decision in a class arbitration brought by a different class member. Such a clear and

unmistakeable statement should appear not only in the arbitration agreement of the class representative, but also in the arbitration agreements of all other class members.

In several contexts, this Court applies a clear-and-unmistakeable standard in resolving disputes under the Federal Arbitration Act. First, when deciding whether a particular merits-related dispute falls within the scope of a valid arbitration agreement, this Court applies a presumption that the dispute is arbitrable, requiring clear contrary language to rebut that presumption. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995). That standard reflects the strong federal policy favoring arbitration. *Id.* Second, when deciding whether a question of arbitrability is arbitrable, this Court applies a presumption that a court decides that question, submitting it to arbitration only if there is "clear and unmistakeable" language to the contrary. *Id.* This is because of a background presumption that parties generally intend disputes over the arbitrability of a dispute to be resolved in court. *Id.* Third, only "clear and unmistakeable" language in a collective bargaining agreement can require an employee to submit individual statutory claims to arbitration. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80-81 (1998). This standard reflect the Court's concern that the interests of unions and of individual employees may diverge. *Id.*

Those authorities support applying a clear-and-unmistakeable standard to the question of whether an arbitration agreement authorizes class arbitration. First, there is a strong federal policy favoring bilateral

arbitration. Second, parties who enter into arbitration agreements generally intend for disputes to be resolved via bilateral rather than class arbitration. Third, in view of the inherent conflicts of interest between class counsel and absent class members, a class member should not be deemed to have consented to being part of a class unless there is clear language in the arbitration agreement stating that the class member may be bound by a decision in a class arbitration brought by a different class member.

Adoption of a clear-and-unmistakeable standard is consistent with *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013). In *Oxford*, this Court declined to disturb an arbitrator's decision that an agreement authorized class arbitration, even though that agreement did not contain clear and unmistakeable language. But the basis for the Court's decision was that the parties had agreed to submit that question to the arbitrator, and there was no basis for reversing the arbitrator under the applicable standard of review. Here, by contrast, this Court reviews the Ninth Circuit's decision de novo.

A clear-and-unmistakeable standard would also ensure that a classwide award could bind absent class members. In *Oxford*, a concurrence raised the concern that a classwide arbitration decision might not bind absent class members that had not agreed in their arbitration agreements to be part of an opt-out class in arbitration. But if there is clear and unmistakeable language in an arbitration agreement that a class member both agreed to class arbitration and could be

part of an opt-out class, then the classwide result could bind them.

ARGUMENT

The RLC agrees with Petitioners that the Federal Arbitration Act preempts an interpretation of the arbitration agreement in this case that would permit class arbitration. As Petitioners correctly state, the generic language in this arbitration agreement does not come close to establishing the parties' intent to authorize class procedures, particularly in view of the tradition of bilateral arbitration.

But rather than merely holding that this particular arbitration agreement does not authorize class arbitration, the Court should adopt a general legal standard for deciding whether an arbitration agreement authorizes class arbitration. In particular, the Court should hold that arbitration agreements do not permit class arbitration unless there is clear and unmistakeable evidence that the parties so intended. This standard would not be satisfied unless the arbitration agreement explicitly states both that a contracting party could arbitrate on behalf of a class, and that the contracting party could be bound by a class arbitration brought by a different class member.

Because the arbitration agreement here does not contain any such explicit statement, the judgment of the Ninth Circuit should be reversed.

I. ARBITRATION AGREEMENTS SHOULD NOT BE INTERPRETED TO PERMIT CLASS ARBITRATION UNLESS THERE IS CLEAR AND UNMISTAKEABLE EVIDENCE THAT THE PARTIES SO INTENDED.

A. This Court Has Repeatedly Applied a Clear-and-Unmistakeable Standard Under the FAA.

On three occasions, this Court has adopted a clear-and-unmistakeable standard for resolving particular types of disputes relating to the interpretation of arbitration agreements. Those authorities support applying the same standard to the question of whether an arbitration agreement authorizes class arbitration.

First, this Court has held that in disputes over "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement," "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *First Options*, 514 U.S. at 944-45 (quotation marks omitted). The Court has based that standard on the strong federal policy favoring arbitration. *See id.* at 945 ("[G]iven the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter" (citations omitted)). That federal policy is grounded in the Federal Arbitration Act, which clearly and unmistakeably requires

arbitration agreements to be enforced according to their terms. *Epic Systems*, 138 S. Ct. at 1621 (noting that the "liberal federal policy favoring arbitration agreements" reflects "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts" (quotation marks omitted)).

Second, this Court has held that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakeably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (internal quotation marks omitted). For instance, "a gateway dispute about whether the parties are bound by a given arbitration clause," or "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," is for the court unless there is a clear and unmistakeable statement in the arbitration agreement. *Id.* at 84. The Court has reasoned that "the 'who (primarily) should decide arbitrability' question" is "rather arcane," and a "party often might not focus upon that question." *First Options*, 514 U.S. at 945 (internal quotation marks omitted). Thus, "given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often

force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.*

Third, this Court has held that collective-bargaining agreements may obligate union members to arbitrate certain types of employment discrimination claims, but only if they do so "clearly and unmistakeably." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009). The "'clear and unmistakeable' standard [is] not applicable" to "an individual's waiver of his own rights"; rather, it applies only to "a union's waiver of the rights of represented employees." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80-81 (1998). This Court has justified the clear-and-unmistakeable standard on the basis of the "potential disparity in interests between a union and an employee," as well as the "tension between collective representation and individual statutory rights." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

B. This Court's Cases Support Applying a Clear-and-Unmistakeable Standard in this Case.

In the three arbitration cases in which this Court has adopted a clear-and-unmistakeable standard, the Court offered three different rationales: the liberal federal policy favoring arbitration; the desire to honor the parties' intent; and a concern about a contracting party not adequately representing the interests of the party required to arbitrate. All three of those rationales support applying a clear-and-unmistakeable

standard to the question of whether an arbitration agreement authorizes class arbitration.

First, federal policy supports the application of a clear-and-unmistakeable standard. There is a liberal federal policy favoring *bilateral* arbitration. As the Court explained in *AT&T Mobility LLC v. Concepcion*, while there is a "national policy favoring arbitration," "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 563 U.S. 333, 346, 348 (2018) (internal quotation marks omitted). The Court explained that "class arbitration *requires* procedural formality" and "greatly increases risks to defendants." *Id.* at 349-50. It further found that "[a]rbitration is poorly suited to the higher stakes of class litigation," in light of the limited scope of judicial review. *Id.* at 350. The Court concluded that a rule invalidating bilateral arbitration agreements "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 352 (quotation marks omitted). Just as the liberal federal policy favoring arbitration supports expansive interpretation of arbitration agreements unless there is clear language to the contrary, so it should support construing agreements to require bilateral arbitration unless there is clear language to the contrary.

Second, the goal of honoring parties' intent supports the application of a clear-and-unmistakeable standard. As the Court explained in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, "class-action

arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 559 U.S. 662, 685 (2010). "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* "But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 685-86. The Court then cited the discussion in *First Options* that parties may not have intended to arbitrate arbitrability. *Id.* at 686 (citing *First Options*, 514 U.S. at 945). Of course, in *First Options*, that concern persuaded the Court to adopt a clear-and-unmistakeable standard for purposes of determining whether parties agreed to arbitrate arbitrability. Likewise here, the Court should adopt the same clear-and-unmistakeable standard for purposes of determining whether parties agreed to conduct class arbitration.

Third, the goal of protecting third parties supports the application of a clear-and-unmistakeable standard. As explained below, there is serious doubt as to whether it is even possible to bind an absent class member to an arbitration award if the class member has not agreed in the arbitration agreement that he may be part of a class. But even if it were possible to bind class members without such an express statement in the arbitration agreement, a serious conflict of

interest would arise between class counsel and named class representatives on the one hand, and other class members on the other. In a typical class action settlement, class counsel recovers millions of dollars, with incentive payments to the named class representative, while class members may recover pennies while irrevocably losing their claims. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005). These concerns are heightened in the context of class arbitration, where class members who object to a settlement have no right to appeal. *Concepcion*, 563 U.S. at 350-51. Just as in the collective-bargaining context, this conflict of interest supports eschewing class arbitration unless the consent of all sides is unmistakeably clear.

C. Application of a Clear-and-Unmistakeable Standard is Consistent with *Oxford*.

A clear-and-unmistakeable standard is fully consistent with *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

In *Oxford*, this Court held that an arbitrator did not exceed its powers by interpreting an arbitration agreement to authorize class arbitration, even though the arbitration agreement did not contain a clear statement authorizing class arbitration. The Court was emphatic, however, that it was not agreeing with the arbitrator's interpretation: "Nothing we say in this

opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading." *Id.* at 572. Rather, its decision was entirely based on the deferential standard of review applicable to arbitration awards: "[C]onvincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes ... The potential for those mistakes is the price of agreeing to arbitration." *Id.* at 572-73.

By contrast, in this case, the court, not the arbitrator, was tasked with deciding whether the contract at issue authorizes class arbitration. Thus, unlike in *Oxford*, this Court may engage in *de novo* review of the Ninth Circuit's interpretation of the arbitration agreement. And in connection with that *de novo* review, this Court can and should hold that a clear-and-unmistakeable standard applies when determining whether an arbitration agreement authorizes class arbitration.

To be sure, if this Court adopts a clear-and-unmistakeable standard, then future arbitrators, bound to apply Supreme Court precedent, would likely hold that contracts similar to the contract at issue in *Oxford* do not permit class arbitration. But this does not mean that *Oxford* was wrongly decided. An arbitrator cannot be reversed for failing to be clairvoyant. As such, because the arbitrator in *Oxford* applied the law in existence at the time of his decision, that decision had to be upheld under the applicable standard of review. At the same time, adopting the clear-and-

unmistakeable standard will not only constrain future judges, but will also put future arbitrators on notice that even when the decision is delegated to them, they should not authorize class arbitration unless the class members have agreed to such a procedure in the arbitration agreement.

D. A Clear-and-Unmistakeable Standard Would Obviate the Concerns Expressed in the *Oxford* Concurrence.

In *Oxford*, Justice Alito, joined by Justice Thomas, filed a concurring opinion expressing doubt as to whether the class arbitration at issue would bind absent class members who had not opted out of the class arbitration. A clear-and-unmistakeable standard would obviate the concerns expressed in that opinion.

The *Oxford* concurrence explained that "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of [a] dispute." *Id.* at 574 (Alito, J., concurring). That is because arbitration "is a matter of consent, not coercion," and a class member who "has not authorized an arbitrator" to issue a classwide award cannot be bound by his award. *Id.* (internal quotation marks omitted). "The distribution of opt-out notices does not cure this fundamental flaw," because "an offeree's silence does not normally modify the terms of a contract." *Id.* "Accordingly, at least where absent class members have not been required to opt in, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who

have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Id.* at 574-75.

The concurrence further explained that if a class arbitration award does not bind absent class members, there is a risk of unfairness to defendants: "Class arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Id.* at 575 (internal quotation marks omitted). Put another way, if the plaintiff class prevails in the arbitration, then the class members will doubtless collect the spoils. But if the plaintiff class loses in the arbitration, the class members can claim that the award does not bind them, and then initiate their own arbitrations.[2]

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[2] Similar concerns arise with claims brought under California's Private Attorneys General Act ("PAGA"). That statute authorizes plaintiffs to bring lawsuits closely analogous to class actions—it authorizes any "aggrieved employee" to recover civil penalties on a representative basis by alleging violations of California labor law on behalf of not only himself, but also "other current or former employees." Cal. Lab. Code § 2699(a). A divided Ninth Circuit recently held that a plaintiff may bring a PAGA claim notwithstanding a bilateral arbitration agreement; the dissent explained that the court's decision "displays th[e] same 'judicial hostility' to arbitration agreements" that led to the FAA's enactment. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015); *id.* at 440 (N.R. Smith, J., dissenting) (citation omitted). Yet because PAGA claims are nominally brought on behalf of the state, it is far from clear that a PAGA claim would bar future class members from bringing their own bilateral arbitration demands. *Id.* at 436 (majority opinion) ("Because a

A clear-and-unmistakeable standard would resolve those issues. If a class member agrees in an arbitration agreement to having a claim resolved in a class arbitration, the class member would plainly be bound by a class arbitration award. And in that scenario, there would be no risk of a heads-I-win-tails-you-lose arbitration: defendants could arbitrate class claims, secure in the knowledge that a judgment or settlement would bind all class members who did not opt out, just like in litigation. Thus, a clear-and-unmistakeable standard would promote fairness both for class members and for class action defendants.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations."). The Court may wish to consider granting a currently-pending petition for certiorari to decide whether PAGA claims are consistent with the FAA. *See* Petition for Writ of Certiorari, *Five Star Senior Living Inc. v. Lefevre*, 86 U.S.L.W. 3567 (U.S. Feb. 23, 2018) (No. 17-1470), 2018 WL 1961027.

Respectfully submitted,

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